through December 31, 1999, were recoverable CERCLA response costs. In August 2002 the District Court issued a thorough opinion largely rejecting Mead's challenges to Beazer's costs. The court determined that Beazer had incurred recoverable response costs of $4,805,137.60 through the end of 1999 and entered judgment against Mead for 67.5% of this amount, or $ 3,243,467.80. Pursuant to the parties' stipulation, in September 2002, the Court further ordered Mead to pay pre-judgment interest in the amount of $1,538,164.03. Finally, in October 2002, the District Court entered a declaratory judgment requiring Mead to pay 67.5% of Beazer's ongoing response costs associated with implementing the AOC. The order also provided a framework for resolution of disputes over the necessity and NCP-consistency of such costs.

Mead timely appealed these orders. In December 2002, we assigned the case for mediation pursuant to the Third Circuit's Appellate Mediation Program, L.A.R. 33. The parties strenuously dispute what transpired at the February 26, 2003, mediation session. Beazer claims that the parties reached an oral agreement while Mead claims that the tentative agreement reached at mediation was conditioned on further management approval which was ultimately denied. In May 2003, Beazer moved this Court to enforce the alleged oral settlement and dismiss Mead's appeal with prejudice. The motion was referred to this panel and we decide it here along with Mead's appeals.

III. Jurisdiction

The District Court had jurisdiction over this case under 42 U.S.C. § 9613(b), which vests exclusive jurisdiction of CERCLA claims in the federal courts, as well as under 28 U.S.C. §§ 1331 and 1332. *Horsehead Industries, Inc. v.*

Paramount Communications, Inc., 258 F.3d 132, 140 (3d Cir. 2001); *Beazer I*, 34 F.3d at 210. We have appellate jurisdiction over the appeal from the District Court's final orders described above pursuant to 28 U.S.C. § 1291. *Horsehead Industries*, 258 F.3d at 140. Finally, we have original jurisdiction over Beazer's motion to enforce the alleged settlement agreement. *See* Fed. R. App. Pro. 33 ("The court may, as a result of the [mediation], enter an order controlling the course of the proceedings or implementing any settlement agreement."). *See also Herrnreiter v. Chi. Hous. Auth.*, 281 F.3d 634, 637 (7th Cir. 2002).

V. Discussion

A. Enforcement of the alleged oral settlement.

Beazer's motion to specifically enforce the alleged oral settlement reached at the appellate mediation and to dismiss this appeal with prejudice must be rejected. Both Local Appellate Rule (LAR) 33.5 and sound judicial policy compel the conclusion that parties to an appellate mediation session are not bound by anything short of a written settlement. Any other rule would seriously undermine the efficacy of the Appellate Mediation Program by compromising the confidentiality of settlement negotiations.[4]

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[4] Federal Rule of Appellate Procedure 33 gives appellate courts the power to order settlement conferences and to "implement[] any settlement agreement" reached as a result of such conferences. Fed. R. App. P. 33. The Third Circuit has established an Appellate Mediation Program to implement this general directive. Local Appellate Rule 33.0. The program is subject to the rules and procedures provided in the Local Appellate Rules. *Id.*

Beazer requests enforcement of the alleged oral settlement but admits that there are genuine factual disputes regarding whether the parties actually reached an agreement.[5] Mead correctly argues that we cannot resolve these disputes without violating the confidentiality rule, LAR 33.5(c). With exceptions not relevant here, Rule 33.5(c) provides that no one at the mediation session - neither mediator, counsel, nor party - may disclose "statements made or information developed during the mediation process." The provision further provides that "the parties are prohibited from using *any* information obtained as a result of the mediation process as a basis for *any* motion or argument to *any* court." LAR 33.5(c) (emphases added). Beazer cannot prove the existence or terms of the disputed oral settlement without violating this provision's broadly stated prohibitions.[6]

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[5] Beazer asserts that the parties reached an oral agreement at the mediation conference but that Mead's management ultimately reneged on the agreement while it was being reduced to writing over the course of the following weeks. Mead contends that the parties only reached "a tentative resolution of some of the financial terms." According to Mead, this resolution was non-binding because it exceeded Mead's representatives' settlement authority. According to Beazer, Mead's representatives never indicated that the agreement reached at the mediation session was conditioned on subsequent approval by Mead's management.

[6] It is true that the rule also provides that "notwithstanding the foregoing, the bare fact that a settlement has been reached as a result of mediation shall not be considered confidential." LAR 33.5(c). However, this exception is unavailing. Beazer may assert the "bare fact" that a settlement was reached but may not offer any evidence supporting this assertion. Since Mead asserts that no settlement was reached, there is no way for us to resolve the dispute.

Beazer argues that the rule is not so sweeping. Beazer concedes that it may not use information obtained at the conference in any argument going to the *merits* of the appeal, but contends that it must be able to use that information for the limited purposes of proving the existence and terms of a settlement. This argument is unpersuasive. First, the rule is stated in the broadest possible language and does not contemplate any such exception. Second, Beazer's proposed exception would effectively undermine the rule and would compromise the effectiveness of the Appellate Mediation Program. A confidentiality provision "permits and encourages counsel to discuss matters in an uninhibited fashion often leading to settlement." *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 929 (2d Cir. 1979). If counsel know beforehand that the proceedings may be laid bare on the claim that an oral settlement occurred at the conference, they will "of necessity . . . feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute." *Id.*; *see also Herrnreiter*, 281 F.3d at 637 ("A motion to implement a conference settlement easily could be a strategy to pierce the confidentiality of the negotiations and inform the judges of the parties' position, rather than to carry out an agreement actually reached."). Third, Beazer's proposed exception would require appellate courts to receive evidence and resolve factual disputes, tasks more properly suited to the district courts. *See Herrnreiter*, 281 F.3d at 637.

We must also consider LAR 33.5(d), which provides that "no party shall be bound by statements or actions at a mediation session unless a settlement is reached." The rule further provides that "if a settlement is reached, the agreement shall be reduced to writing and shall be binding upon all parties to the agreement." Mead argues that the most

"straightforward" reading of this rule is that no agreement is binding until it is written. Mead's reading is serial: 1) if the parties reach an agreement, 2) then that agreement shall be written down, and 3) then, and only then, the agreement shall be binding. However, the grammatical structure of the rule is consistent with a parallel construction: 1) if the parties reach an agreement, 2)a) then it shall be reduced to writing, and, 2)b) then it shall be binding. Under this reading, the agreement is binding because it has been reached, not because it has been written down.

The "parallel" construction of Rule 33.5(d) -- which would make oral settlement agreements binding on the parties -- is irreconcilable with Rule 33.5(c), because, as described above, there is no way to prove the existence or terms of a disputed oral settlement without violating the confidentiality provision. Therefore, we adopt Mead's "serial" reading of Rule 33.5(d), according to which an agreement is not binding unless it is reduced to writing. We note that the Ninth Circuit adopted a serial interpretation of similar language in *Barnett v. Sea Land Serv., Inc.*, 875 F.2d 741, 743-44 (9th Cir. 1989).[7]

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[7] As in this case, the parties in *Barnett* entered into mediation, but one of the parties refused to sign a settlement agreement prepared by another party after the mediation took place and argued that no settlement had been reached. *Id.* Relying on Local Rule 39.1, a confidentiality provision governing mediation proceedings in the Western District of Washington, the District Court prohibited the party seeking to enforce the alleged agreement from eliciting testimony from the mediator about whether a settlement had been reached. *Id.* Local Rule 39.1 is very similar to the Third Circuit's LAR 33.5(c) & (d). After providing that mediation proceedings and statements are privileged, the rule states that "no party shall be bound by anything done or said at the conference unless a

Further, Judge Easterbrook's opinion in *Herrnreiter* provides persuasive policy justifications for requiring written settlements.[8] In *Herrnreiter* the parties admitted that they had reached an oral settlement at a voluntary appellate mediation session but they did not agree on the terms. *Id.* at 636. The court denied the defendant's motion to implement the oral settlement. *Id.* at 637. The court noted that there is no transcript of appellate mediation sessions and that settlement conference attorneys presiding over such sessions promise both sides that nothing that transpires at the conference will be revealed to the judges; the court finally observed that appellate courts are not well-positioned to conduct factfinding missions. *Id.* Accordingly, the court concluded that nothing short of a mutually satisfactory written settlement agreement could terminate an appeal. *Id.* "Any other approach would compromise the confidentiality of the negotiations, require the settlement attorneys to become witnesses in appellate factfinding proceedings, and substantially complicate the disposition of litigation." *Id.* All of these concerns are equally present in this case. In fact, the argument for preserving confidentiality of proceedings is even stronger in this case, where participation in the appellate mediation program is

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settlement is reached, in which event the agreement upon a settlement shall be reduced to writing and shall be binding upon all the parties to that agreement." *Id.* The Ninth Circuit interpreted this language to mean that "until a settlement is reduced to writing, it is not binding upon the parties." *Id.* at 744.

[8] If there are analogous local rules governing the Seventh Circuit's appellate mediation program the Court in *Herrnreitter* did not address them. Rather, it interpreted the text of Fed. R. App. Pro. 33, which does not contain a confidentiality provision, and the practice of the Seventh Circuit's Settlement Conference Office. 281 F.3d at 637-38.

mandatory and the mediation is directed by a court-employed mediator or a judicial officer. *See In re Anonymous*, 283 F.3d 627, 636-37 (4th Cir. 2002) (citation omitted).

Beazer complains that if Mead's interpretation of Rules 33.5(c) and (d) is accepted then parties will be able to enter into oral agreements at settlement conferences and simply back out on a whim, significantly deterring the federal policy of encouraging settlements. *See D.R. v. East Brunswick Bd. of Educ.*, 109 F.3d 896, 901 (3d Cir. 1997). Beazer also relies on our oft-repeated position that a written agreement is not necessary to render a settlement enforceable. *See, e.g., Green v. John H. Lewis & Co.*, 436 F.2d 389, 390 (3d Cir. 1970) (citations omitted). Mead's first argument is simply incorrect: if parties know beforehand that only a written settlement agreement is binding, they will be sure to memorialize their agreement in writing at the end of the mediation session. Its second argument is based on basic common law contract principles, *see Main Line Theatres, Inc. v. Paramount Film Distributing Corp.*, 298 F.2d 801, 803 (3d Cir. 1962), and has no application where specific court rules provide otherwise.

For all these reasons, Beazer's motion to enforce the alleged oral settlement agreement and dismiss the appeal is denied.

B. The District Court's Referral to the Magistrate Judge.

Mead argues that the Magistrates Act, 28 U.S.C. § 636, does not authorize the District Court's referral to the Magistrate Judge, over Mead's objection, of the equitable allocation issue. Mead contends that, for that reason, the Magistrate Judge lacked jurisdiction to conduct a hearing or issue a Report and Recommendation. Mead further asserts

that, because the Magistrate Judge lacked jurisdiction, the District Court's putative *de novo* review did not rectify the improper referral. We agree with Mead on both points.[9]

The jurisdiction of magistrate judges is limited by statute and may not be augmented by the federal courts. *See Thomas v. Whitworth*, 136 F.3d 756, 758 (11th Cir. 1998) (citing *NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir. 1994)). The District Court did not rely on any specific provision of the Magistrates Act in its order of referral or its order rejecting Mead's objections to the referral, but it is clear from the context that the court considered the equitable allocation issue a "pretrial matter" under § 636(b)(1).[10] Beazer argues in the alternative that the referral could be re-characterized as a designation of the Magistrate Judge to serve as a special master under § 636(b)(2) and Federal Rule of Civil Procedure 53(b). Beazer also argues that the referral was permissible under § 636(b)(3), which authorizes magistrate judges to undertake "such additional duties as are not inconsistent with the Constitution and laws of the United States." We conclude that the referral was not proper under any provision of the Magistrates Act.[11]

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[9] The scope of a magistrate judge's authority is a question of law over which this Court exercises plenary review. *Bowers v. NCAA*, 346 F.3d 402, 410 (3d Cir. 2003).

[10] We agree with the Fifth Circuit that "good practice would indicate that court orders of designation or reference state plainly under what statutory provision the court is proceeding." *Archie v. Christian*, 808 F.2d 1132, 1137 (5th Cir. 1987) (en banc); *see also Silberstein v. Silberstein*, 859 F.2d 40, 42 (7th Cir. 1988).

[11] The District Court also held that Mead's objections to the referral were untimely because Mead did not immediately object but waited until the Magistrate Judge had issued a scheduling order

1. Equitable allocation is not a "pretrial matter."

We first consider whether the equitable allocation proceeding referred to the Magistrate Judge is correctly characterized as a "pretrial matter." The Magistrates Act authorizes district courts to appoint magistrate judges to consider pretrial matters without regard to the parties'

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contemplating implementation of the referral. Mead correctly argues that objections to a magistrate judge's authority are jurisdictional and may be raised at any time. *Government of Virgin Islands v. Williams*, 892 F.2d 305, 309 (3d Cir. 1989). Further, for reasons provided in the next section of this opinion we conclude that the Magistrate Judge essentially held a trial on the equitable allocation issue, and trials may not be conducted by a magistrate judge without the parties' consent. 28 U.S.C. § 636(c)(1). Even if this consent requirement could be waived, a question we need not reach here, we agree with Mead that the brief lapse following the District Court's order of referral cannot be construed as a waiver. Mead objected to the Magistrate Judge's authority to consider the equitable allocation issue just after the Magistrate Judge entered its scheduling order and long before the Magistrate Judge had begun to consider the merits of this issue, much less receive the parties' submissions or hold a hearing.

We note that Beazer has failed on appeal to respond to any of Mead's arguments on this point. Of course, an appellee does not concede that a judgment should be reversed by failing to respond to an appellant's argument in favor of reversal. *See Singletary v. Continental Illinois Nat'l Bank*, 9 F.3d 1236, 1240 (7th Cir.1993). However, the appellee "waives, as a practical matter anyway, any objections not obvious to the court to specific points urged by the [appellant]." *Hardy v. City Optical Inc.*, 39 F.3d 765, 771 (7th Cir. 1994) (citations omitted).

consent. 28 U.S.C. § 636(b)(1).[12] The District Court considered the equitable allocation proceeding a pretrial matter because it constituted a "significant step" in resolving the case:

> First, the identification of the equitable factors that will be relevant in an ultimate disposition of this case essentially is a pretrial matter and constitutes a significant step in resolving the parties' current dispute. In addition, submitting briefs in support of an allocation of Beazer's clean-up costs among the parties likewise is a pretrial undertaking which is necessary to narrow the issues for trial.

The District Court's reasoning is misleading and without supporting authority. First, the District Court significantly understates the significance and scope of the referral. The parties did not simply "submit briefs" in support of the equitable allocation issue -- they presented extensive testimonial and documentary evidence over the course of a 12-day hearing. At the conclusion of this hearing the Magistrate Judge not only identified equitable factors but also applied those factors to make a recommendation as to the allocation of liability among the parties. Second, by the District Court's reasoning, any issue in the case could be could be considered by a magistrate judge in a "pretrial" proceeding so long as the Court later conducted a "trial" on at least one issue. Whether a given issue is a "pretrial

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[12] The magistrate judge may hear and decide nondispositive pretrial matters but may only issue a report and recommendation on dispositive pre-trial matters. *Compare* 28 U.S.C. § 636(b)(1)(A) *with id.* at § 636(b)(1)(B); *see also* Fed. R. Civ. P. 72; *United States v. Polishan*, 336 F.3d 234, 239 (3d Cir. 2003); *NLRB v. Frazier*, 966 F.2d 812, 816 (3d Cir. 1992).

matter," however, turns on the nature of the issue itself, not on the position in which it falls in the sequence of decision.

A CERCLA contribution action consists of determining which parties are liable under CERCLA and apportioning the liable parties' shares in an equitable manner. *See* 42 U.S.C. §§ 9607(a) & 9613(f)(1); *New Jersey Turnpike Authority v. PPG Industries, Inc.*, 197 F.3d 96, 104 & n.7 (3d Cir. 1999); *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 656-57 (6th Cir. 2000). Here, the first phase was uncontested: Mead, Beazer, and KII are each liable as current or former owners and operators of the Woodward Coke Plant. *See* 42 U.S.C. § 9607(a)(1). The equitable apportionment phase was divided into two proceedings: a proceeding (conducted by the Magistrate Judge) to determine the parties' equitable shares of response costs on a percentage basis, *see* 42 U.S.C. § 9613(f)(1), and a separate proceeding (conducted by the District Court) to determine which of Beazer's actual costs qualify as recoverable response costs, *see* 42 U.S.C. § 9607(a)(4)(B). Contrary to the District Court's assertions, then, the issue referred to the Magistrate Judge was not a precursor to resolution of the ultimate issue -- it was one of the ultimate issues to be tried. In fact, it was the only issue in the case unique to contribution claims. Whether a party is liable and which costs are recoverable are questions governed by CERCLA's liability provision, 42 U.S.C. § 9607. The contribution provision, section 9613(f)(1), provides that "in resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." This was the very task referred to the Magistrate Judge.

Further, this task required the Magistrate Judge to resolve factual disputes going to the merits of the case. In *Banks v. United States*, 614 F.2d 95 (6th Cir. 1980), the court

reasoned that section 636(b)(1) was carefully drafted to avoid granting magistrate judges the authority to perform fact-finding on the merits of case because that function is the essence of a trial, and magistrate judges cannot conduct trials without the parties' consent:

> The statute clearly contemplates that a magistrate be allowed to help a district judge with a variety of pre-trial motions. However, absent consent, the magistrate cannot conduct a trial itself. Under our system of law, when there are factual controversies, there must be a trial. Only when a party is entitled to judgment as a matter of law may a trial be aborted. *See e.g.* Fed R. Civ. P. 12, 56. Congress was careful to recognize this distinction when it amended the Federal Magistrate's Act. The Act permits a magistrate to prepare proposed findings on a variety of "case dispositive" motions such as summary judgment. Except for prisoner's cases, the act does not permit the magistrate to perform fact-finding on the merits of a case. That is the exclusive function of a district judge. Indeed, the magistrate judge's role is to free the judge from pre-trial wrangling so that he can try cases.

Id. at 97.[13] In this case the Magistrate Judge did not facilitate the District Court's ultimate adjudicatory function - he assumed that function. In the course of making his Report and Recommendation, the Magistrate Judge resolved two critical factual disputes. First, the he determined that Mead was responsible for approximately 90% of the waste at the Woodward Coke Plant. Second, he found that the parties to the 1974 purchase agreement intended that Mead would not be responsible for any environmental liabilities at the Plant. By making these findings, he tried part of the case and usurped the role of the District Judge. Accordingly, the equitable allocation proceeding conducted by the Magistrate Judge is not a "pretrial matter" under 28 U.S.C. § 636(b)(1).

One further argument warrants mention. Beazer and the District Court imply that the equitable allocation proceeding conducted by the Magistrate Judge was a "pretrial matter" simply because it preceded the recoverable costs proceeding conducted by the District Court. This is mere happenstance. The proceedings could have been held in the reverse order or held together. As discussed above, the important issue is not the order of decision but the nature of decision - both the equitable allocation proceeding and the recoverable costs

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[13] This interpretation is supported by the legislative history of the Magistrate's Act and its amendments. *See, e.g.*, H.R. Rep. No. 94-1609, at 7 (1976) (explaining that the magistrate judge is to "assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case."); *see also Gomez v. United States*, 490 U.S. 858, 872, 104 L. Ed. 2d 923, 109 S. Ct. 2237 & n.23, 490 U.S. 858, 104 L. Ed. 2d 923, 109 S. Ct. 2237 (1989) (collecting legislative history for the proposition that "magistrates should handle subsidiary matters to enable district judges to concentrate on trying cases").

proceeding required the decisionmaker to resolve factual disputes going to the ultimate issues in the case.

2. Equitable allocation cannot be referred to a special master without the parties' consent.

Beazer argues that, even if the referral is not authorized by § 636(b)(1), we should recharacterize the referral as a designation of the Magistrate Judge to serve as a special master under § 636(b)(2). We need not reach the issue of whether an appellate court can save a flawed referral in this manner because we hold that the designation of a Magistrate Judge to conduct an equitable allocation without the parties' consent would constitute an abuse of discretion.[14] *See Sierra Club v. Browner*, 257 F.3d 444, 446 (9th Cir. 2001) (designation of special master is reviewed for abuse of discretion); *American Cyanamid Co. v. Ellis-Foster Co.*, 298 F.2d 244, 247 (3d Cir. 1962) (same).

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[14] At least one circuit court has suggested in *dictum* that an improper referral under § 636(b)(1) could be re-characterized as a designation of a magistrate judge to serve as a special master per § 636(b)(2) and Rule 53(b). In *Callier v. Gray*, 167 F.3d 977, 983 (6th Cir. 1999), the court upheld an ambiguous referral to a magistrate judge of a damages issue under the "additional duties" provision, § 636(b)(3). The court noted that Rule 53(b) might have served as an "additional basis for jurisdiction of the magistrate judge on the damages dispute," but concluded that it did not need to reach the issue. *Id.* at 983 n.10. The court entertained this idea even though the referral in that case was made specifically under § 636(b)(1)(B), not § 636(b)(2). We take no position on this issue.

Section 636(b)(2) provides in pertinent part that a judge "may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure" without the parties' consent. The applicable Federal Rule is Rule 53(b), which provides for references to special masters:

> A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.[15]

The non-jury standard of review applies here. Thus, unless the proceeding referred to the Magistrate Judge in this case is characterized as part of a "difficult computation of damages," the reference can only be justified upon a showing that some "exceptional condition" required it.

Beazer makes no argument that any "exceptional condition" exists in this case, nor does Beazer argue that the Magistrate Judge performed any difficult computations. Rather, Beazer contends that the referral was proper because the equitable allocation proceeding conducted by the Magistrate Judge was a "predicate" to a "difficult computation of damages" performed by the District Court. Beazer's expansive reading of Rule 53(b) is at odds with the Supreme Court's restrictive interpretation.

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[15] Both § 636(b)(2) and Rule 53(b) provide that a magistrate judge may be designated as a special master without regard to Rule 53(b)'s limitations upon consent of the parties. Because Mead did not consent, this exception is inapplicable.

In *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256, 259, 1 L. Ed. 2d 290, 77 S. Ct. 309 (1957), the Court affirmed the appellate court's issuance of a writ of mandamus compelling the District Court to vacate its order referring essentially the entirety of two complex antitrust cases to a special master. The Court noted that while masters could "aid judges" in the performance of specific duties, they could not be permitted to "displace the court." *Id.* at 256; *see also Prudential Ins. Co. v. United States Gypsum Co.*, 991 F.2d 1080, 1086 (3d Cir. 1993) ("A district court has no discretion to delegate its adjudicatory responsibility in favor of a decision maker who has not been appointed by the President and confirmed by the Senate.") (citing *La Buy*); *In re Bituminous Coal Operators' Ass'n.* 292 U.S. App. D.C. 309, 949 F.2d 1165, 1168 (D.C. Cir. 1991) ("Rule 53 . . . authorizes the appointment of special masters to *assist*, not to replace, the adjudicator, whether judge or jury, constitutionally indicated for federal court litigation"). The Court found that the references at issue "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation." *La Buy*, 352 U.S. at 256.[16] The Court acknowledged, however, that difficult

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[16] The Court also rejected the judge's claim that docket congestion, complexity, and length of time necessary for trial constituted "exceptional circumstances" justifying the reference. *Id.* at 258-59; *see also* Charles Alan Wright & Arthur R. Miller, 9A Federal Practice and Procedure § 2605, at 662 (2d ed. 1994) (noting that the Court rejected "the three most obvious matters" that might be thought to constitute "exceptional conditions"); *In re Armco, Inc.*, 770 F.2d 103, 105 (8th Cir. 1985) ("Beyond matters of account, difficult computation of damages, and unusual discovery, it is difficult to conceive of a reference of a nonjury case that will meet the rigid standards of the *La Buy* decision.") (internal quotations omitted).

damages computations could sometimes be referred to a master without the parties' consent. "The detailed accounting required to determine the damages suffered by each plaintiff might be referred to a master after the court has determined the over-all liability of defendants, provided the circumstances indicate that the use of the court's time is not warranted in receiving the proof and making the tabulation." *Id.* at 259.

Accountings and other damages computations may be referred without the parties' consent because they generally do not call for any peculiar judicial talent or insight. *See* 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2605 at 655-66 (2d ed. 1994). Equitable apportionment, on the other hand, is a quintessentially judicial endeavor. CERCLA's contribution provision authorizes the court to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). In a given case, "a court may consider several factors or a few, depending on the totality of the circumstances and equitable considerations." *New Jersey Turnpike Authority v. PPG Industries, Inc.*, 197 F.3d 96, 104 (3d Cir. 1999) (citation omitted). This flexible inquiry involves discretion, judgment, and legal reasoning that simply is not connoted by the phrase "difficult computation of damages." This case provides a good illustration of this point.

The Magistrate Judge's proposed allocation turned chiefly on three factors: 1) volume of waste should be the pre-eminent equitable factor given CERCLA's over-arching "polluter-pays" principle; 2) Mead was responsible for approximately 90% of the waste; and 3) Mead was nonetheless entitled to a reduction in its share based on the parties' intent that Mead would not be responsible for future environmental liabilities. In weighing these factors, only the

second is reasonably related to a "computation of damages." The other two turn on questions of law, policy, equity, and contractual intent. Further, even with respect to weighing the second factor, the computations performed by the Magistrate Judge were not "difficult" - they entailed elementary subtraction and addition of percentages. The Magistrate Judge did not crunch any numbers to determine that Mead was responsible for 90% of the waste on the site; rather, he decided which expert's percentage estimates were more convincing. In fact, even this decision largely turned on a legal question: should Beazer be able to recover all of its response costs based on an AOC ordered under the Resource Conservation and Recovery Act that required investigation and monitoring of the entire industrial site, or should it be limited, as Mead's chief expert contended, to costs that would have been assessed under a more modest hypothetical AOC issued pursuant to CERCLA? Thus, the issues referred to the Magistrate Judge here were not akin to a complicated accounting or difficult damages calculation. Rather, they were foremost among the "basic issues" to be tried, and the District Court's referral of those issues without the parties' consent was "an abdication of the judicial function." *La Buy*, 352 U.S. at 256.

Beazer also argues that our opinion in *Beazer I* ended the "liability phase" of this case, that everything that occurred on remand constituted the "damages phase," and therefore everything on remand could have been properly referred to a master. This formalistic argument is inconsistent with *La Buy*'s reasoning. In *United States v. Microsoft Corp.*, 331 U.S. App. D.C. 121, 147 F.3d 935, 954-55 (D.C. Cir. 1998), the D.C. Circuit Court of Appeals vacated a reference to a special master to determine the parties' rights under a complex consent decree. Seeking to uphold the reference, the Department of Justice invoked the "well-established tradition"

allowing special masters to oversee compliance during the remedial phase of litigation, arguing that the reference to oversee implementation of the consent decree fell squarely within that tradition. *Id.* at 954. (citations omitted). The court rejected this position, holding that "the matters referred to the master are no more "remedial" than would be those of any total referral of a contract case. The concern about nonconsensual references turns on the determination of rights, not on a formalistic division of the juridical universe into pre-trial, trial and post-trial. It is for this reason that special masters may not decide dispositive pretrial motions." *Id.* (citation omitted). Similarly, the reference here involved a complex and delicate determination of equities.

We note, however, that there is some support for Beazer's position. In *United States v. Conservation Chemical Co.*, 106 F.R.D. 210, 216 (W.D. Mo. 1985), the District Court referred all pretrial and discovery matters as well as the trial on the merits to a special master without the parties' consent. The reference included "the authority to hold hearings and issue recommendations on the claims for . . . apportionment of costs." *Id.* Predictably, the Eighth Circuit Court of Appeals held that no "exceptional condition" justified the District Court's sweeping reference. *In re Armco*, 770 F.2d 103, 105 (8th Cir. 1985). But then, without explaining its reasoning, the court affirmed all aspects of the reference except for the trial on the liability issues. Thus, the court affirmed reference of all post-liability damages proceedings. *Id.* Although not explicitly stated, this reference necessarily covered any equitable allocation proceedings that might be necessary to resolve contribution claims brought by any of the liable parties.

The *Armco* Court's unexplained decision to uphold the reference of dispositive matters without any showing of

exceptional conditions has been met with perplexity by two other circuit courts. *Stauble v. Warrob, Inc.*, 977 F.2d 690, 696 (1st Cir. 1992) (noting that the court was "baffled" by the *Armco* Court's decision to authorize reference of dispositive pre-trial motions); *In re United States*, 816 F.2d 1083, 1091 (6th Cir. 1987) (noting the court's inability "to follow the [*Armco*] Court's reasoning" on this issue). We also do not consider *Armco* to be persuasive authority. It is possible that the *Armco* Court was overly solicitous towards the District Court's Rule 53(b) reference because it perceived that the District Court required an extraordinary degree of flexibility to handle an enormous CERCLA case involving more than 250 parties. *See* 9A Wright & Miller, Federal Practice and Procedure § 2605, at 666 ("Despite the restrictive standard set out in the *La Buy* case, the actual utilization of masters under Rule 53(b) in the past two decades has been quite lively[,] undoubtedly [in response to] the rapid growth of complex litigation in the federal courts, particularly in cases requiring significant scientific and technical knowledge, [and] management skills"). In contrast, this case does not present similar administrative challenges -- there are only three parties, and one, KII, has played only a minor role in the proceedings.

Accordingly, we reject Beazer's contention that the District Court could have designated the Magistrate Judge to hear the equitable allocation issue as a special master without Mead's consent.

3. Equitable allocation cannot be referred under the "additional duties" clause.

Finally, we reject Beazer's suggestion that the referral was proper under the "additional duties" clause. 28 U.S.C. § 636(b)(3). This clause covers only subsidiary matters in the

absence of the parties' consent, and equitable allocation is central, rather than subsidiary, to a CERCLA contribution action.

The parties' consent or lack thereof is a key factor in deciding whether a referral is authorized under the "additional duties" clause. In *Gomez v. United States*, 490 U.S. 858, 876, 104 L. Ed. 2d 923, 109 S. Ct. 2237 (1989), the Court held that this clause did not authorize magistrate judges to supervise *voir dire* proceedings in a criminal case over a defendant's objection. However, in *Peretz v. United States*, 501 U.S. 923, 932-36, 115 L. Ed. 2d 808, 111 S. Ct. 2661 (1991), the Court held that the "additional duties" clause *did* authorize the reference of *voir dire* in a criminal case where the defendant consented to the reference. The Court reasoned that the scope of the clause varied significantly according to whether the parties' consented to the reference. *See Peretz*, 501 U.S. at 931-33; *Gomez*, 490 U.S. at 870-71. As the Court explained in *Gomez* and reiterated in *Peretz*, the scope of § 636(b)(3)'s residuary clause had to be interpreted in light of the duties specifically authorized in the other sections of the Act. *Peretz*, 501 U.S. at 930-31 (citing *Gomez*, 490 U.S. at 864). The Court explained that "the duties that a magistrate judge may perform over the parties' objections are generally subsidiary matters not comparable to supervision of jury selection. However, with the parties' consent, a district judge may delegate to a magistrate judge supervision of entire civil and misdemeanor trials. These duties are comparable in responsibility and importance to presiding over *voir dire* at a felony trial." *Peretz*, 501 U.S. at 932.

Thus, in the absence of Mead's consent, the referral would only be authorized under § 636(b)(3) if we characterized the equitable allocation proceeding as a "subsidiary matter." *See* Charles Alan Wright et al, 12

Federal Practice & Procedure § 3068.1 at 329 (2d ed. 1997). As explained in the previous two sections, equitable allocation is central to Beazer's CERCLA action, not subsidiary thereto. Accordingly, the referral could not be authorized under the "additional duties" clause over Mead's objection.

This conclusion is consistent with Congressional intent. As the Court in *Peretz* explained, "the Act is designed to relieve the district courts of certain subordinate duties that often distract the courts from more important matters." 501 U.S. at 934. In support of this assessment, the Court cited several statements from the legislative history of the Act and its various amendments. *See, e.g.*, H.R. Rep. no. 94-1609, p. 7 (1976) (stating that a magistrate judge is to "assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case"). Equitable allocation is at the very core of a CERCLA contribution action and is not a preliminary or subordinate matter.

4. Remand is required notwithstanding the District Court's purported *de novo* review.

Beazer contends, and the District Court reasoned, that any flaw in the referral is corrected by the District Court's purported *de novo* review of the Magistrate Judge's proposed equitable allocation. This argument is unavailing.

First, as noted above, a magistrate judge's authority is jurisdictional. Without the parties' consent, a magistrate judge cannot conduct a trial or any part thereof, *see* 28 U.S.C. § 636(c)(1) ("upon the consent of the parties, a . . . magistrate judge . . . may conduct any or all proceedings in a jury or nonjury civil matter"), and "the mere existence of a recommendation [and accompanying *de novo* review] will

not change a full trial [or any part thereof] into a pre-trial motion." *Jeffrey S. v. State Bd. of Educ.*, 896 F.2d 507, 512 n.17 (11th Cir. 1990) (citing *Hall v. Sharpe*, 812 F.2d 644, 647 (11th Cir. 1987)). Second, § 636(b)(1)(B) provides that certain dispositive pre-trial motions may be referred to a magistrate judge, but the magistrate judge's proposal must be reviewed *de novo* by the court. Mead correctly argues that this provision would be meaningless if no specific statutory delegation were necessary so long as the District Court conducted a *de novo* review. Third, the District Court's error cannot be considered harmless no matter how admirable the Magistrate Judge's efforts may have been. *See United States v. Ruiz-Rodriguez*, 277 F.3d 1281, 1293 n.17 (11th Cir. 2002) ("Harmless error analysis does not apply when a magistrate judge lacks the power to act."). Since the Magistrate Judge lacked the power to conduct the equitable allocation proceeding in this case, there was nothing for the District Court to review.[17]

Although the issue of appropriate remedy is less settled where the flawed referral is to a special master (or a magistrate judge acting as a special master) rather than to a magistrate judge *qua* magistrate judge, remand for a new trial is the proper remedy even if the District Court's referral could be re-characterized as a designation of the Magistrate Judge to serve as a special master. First, while at least two courts of appeals have suggested that a remand for a new trial may not be required where the district court reviews the master's report *de novo*, *Sierra Club v. Browner*, 257 F.3d 444, 447 (9th Cir. 2001) (vacating reference but declining to

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[17] Because we conclude that the District Court could not save the flawed referral no matter what level of review it conducted, we need not consider whether it actually performed a *de novo* review of the Magistrate Judge's report and recommendation.

decide whether *de novo* review by the district judge could save a flawed reference), *Stauble*, 977 F.2d at 698 n.12 (same), we rejected a similar argument in *Prudential*. The District Court in *Prudential* had stated that the reference was limited to pre-trial motions, and that it would review every conclusion of law proposed by the special master *de novo*. 991 F.2d at 1086 n.11. We reasoned, however, that *de novo* review of legal matters could not save an improper referral because such review was always available regardless of whether the referral violated Rule 53(b). *Id.* That is, if *de novo* review of legal issues cured referrals made in violation of Rule 53(b), that provision would be meaningless.

Furthermore, the referral in this case encompassed questions of fact as well as questions of law, and Rule 53(e)(2) provides that in non-jury trials the district court "*shall* accept the master's findings of fact unless clearly erroneous." Fed. R. Civ. Pro. 53(e)(2) (emphasis added); *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1097 (3d Cir. 1987) (noting that review of master's legal conclusions is plenary, but that district court must accept master's factual findings unless clearly erroneous). Relying on this provision, the court in *Microsoft* rejected the argument that *de novo* review can save an improper referral because the master's factual conclusions cannot be reviewed *de novo* under Rule 53(e)(2). 147 F.3d at 955; *see also Sierra Club*, 257 F.3d at 448 (suggesting but not reaching same conclusion). In this case the District Court claims that it reviewed both the Magistrate Judge's factual findings and its legal conclusions *de novo*. This is inconsistent with Rule 53(e)(2), and a district court cannot cure one violation of Rule 53 by committing another. Finally, it would be inappropriate to re-characterize the referral as a flawed designation of a special master solely to avoid the remand required by case law construing other provisions of the Magistrates Act.

Accordingly, this case must be remanded for a new equitable allocation proceeding before the District Court. We note that Beazer's contribution action is now in its fourteenth year and will likely enjoy several more birthdays, partly because our reversal today will require the parties to retread well-worn ground. In an attempt to avoid further duplicative litigation and speed this case towards its conclusion, we take this opportunity to resolve two other issues raised by the parties on appeal.

C. The District Court's Equitable Allocation Was Erroneous.

First, we agree with Mead that the District Court committed legal error, and therefore abused its discretion, in prioritizing the parties' respective contributions of waste at the Woodward Coke Plant in determining the appropriate allocation of Beazer's response costs.[18] The District Court found that the parties to the 1974 sale intended that Mead would not bear any environmental liability following the 1974 sale, but reduced Mead's equitable share by only 20% in recognition of this and related findings that we refer to here

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[18] A district court's allocation of CERCLA response costs in a contribution action is reviewed for abuse of discretion. *See, e.g., Kalamazoo River Study Group v. Rockwell Intern. Corp.*, 274 F.3d 1043, 1047 (6th Cir. 2001). An abuse of discretion occurs when "the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *International Union v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir.1987).

as the "purchase agreement factors," all of which favor Mead.[19]

The District Court's decision to prioritize the volume of waste over the purchase agreement factors appears to follow two related rationales explicitly developed in the Magistrate Judge's Report and Recommendation. The Magistrate Judge concluded that "CERCLA is premised upon the policy that the 'polluter pays.'" Thus, the Magistrate Judge began from the premise that each party's equitable share should be driven by its respective contribution of waste. The Magistrate Judge deviated only slightly from this premise to account for the equitable factors surrounding the 1974 sale. The Magistrate Judge also concluded that it would be inconsistent with our decision in *Beazer I* to allocate "all or even most" of the response costs to Mead. The District Court somewhat ambiguously adopted each rationale. However, neither *Beazer I*, nor CERCLA itself, requires that the parties' intent to shift environmental risk be subordinated to the "polluter pays" principle - as long as someone pays. Therefore, the District Court's allocation, which was based in part on its agreement

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[19] The District Court found that the parties to the 1974 agreement "intended that Mead be able to 'walk away' from the site, i.e., that Mead would not indemnify [KCI, Beazer's predecessor] for any future costs at the site for any reason, including environmental response costs." The District Court also found that KCI purchased the property pursuant to the doctrine of *caveat emptor*, that the purchase agreement contained an "as is" clause, that KCI was "well aware of the environmental condition of the site" after performing a full inspection prior to purchase, and that "reasonable parties negotiating the sale of an industrial site in Alabama in 1974 would expect that the seller would not be held liable for any future environmental costs."

with the Magistrate Judge's flawed reasoning, was an abuse of discretion.

First, the Magistrate Judge's and District Court's prioritization of the "polluter pays" principle in equitable allocation proceedings is inconsistent with CERCLA's contribution provision. That provision authorizes the district courts to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Courts examining this language and its history have concluded that Congress intended to grant the district courts significant flexibility in determining equitable allocations of response costs, without requiring the courts to prioritize, much less consider, any specific factor. In a leading case, the Seventh Circuit Court of Appeals explained that "the language of section 9613(f) clearly indicates Congress's intent to allow courts to determine what factors should be considered in their own discretion without requiring a court to consider any particular list of factors." *Environmental Transportation Systems, Inc. v. ENSCO*, 969 F.2d 503, 508 (7th Cir. 1992); *see also United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 576-77 (6th Cir. 1991) (reasoning that section 9613(f)(1)'s language "confirms the legislative intent to grant courts flexibility in exercising their discretion") (citations to legislative history omitted). As we have held, "a court may consider several factors or a few, depending on the totality of the circumstances." *New Jersey Turnpike Authority v. PPG Industries, Inc.*, 197 F.3d 96, 104 (3d Cir. 1999) (citation omitted).

Accordingly, the "polluter pays" principle has no canonical or transcendent importance under § 9613(f)(1); it is certainly not the "primary policy" of contribution claims, as implied by the District Court. It is simply one of many factors

that may or may not bear on a given equitable allocation determination. *See Kerr-McGee*, 14 F.3d at 326 (listing possible factors). Specifically, there is no basis in CERCLA's text or history for prioritizing *a priori* the parties' relative contributions of waste over their contractual intent to allocate environmental liability among themselves. To the contrary, CERCLA expressly authorizes private indemnity agreements, *see* 42 U.S.C. § 9607(e)(1); *Fisher Development Co. v. Boise Cascade Corp.*, 37 F.3d 104, 110 (3d Cir. 1994) (finding in § 107(e)(1) "a policy favoring private ordering of ultimate risk distribution"), and the District Court's insistence on elevating relative waste contribution is fundamentally inconsistent with CERCLA's policy of favoring private indemnity agreements.

Second, *Beazer I* dealt with the *legal* interpretation of Paragraph 4(c). As a matter of *equity*, however, the intent of the parties, which is manifested by their actions and in the written agreement, can be taken into account - no matter what our *legal* conclusion was in *Beazer I*. *Beazer I* does not tip the *equitable* scales one way or another. In *Beazer I*, we determined that the 1974 agreement was governed by Alabama law, 34 F.3d at 211-15, and that indemnification agreements are enforceable under Alabama law only if they contain "a plain and unambiguous expression of intent to cover the cost of the liability in question." *Id.* at 216. Applying this standard, we concluded that "nothing in this agreement demonstrates a clear and unambiguous intent to transfer all CERCLA liability to [KCI]." *Id.* at 219. The Magistrate Judge correctly reasoned that *Beazer I* reached no conclusion regarding the parties' actual intent; only that, as a matter of Alabama law, the contract did not contain a sufficiently clear expression that KCI would indemnify Mead against all environmental liability associated with the site. *See id.* Thus, the Magistrate Judge concluded that "there is no

inherent inconsistency in the ruling made on appeal and a decision by this court that, as a matter of equity, the parties' intentions concerning indemnity, to the extent they can be divined from both the document and any other evidence offered by the parties, should be considered in equitable allocation."[20]

However, the Magistrate Judge further reasoned that shifting all or most of the response costs to Beazer based on the purchase agreement factors "would give the agreement, found legally insufficient under Alabama law, the force of

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[20] The Magistrate Judge properly cited *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321 (7th Cir. 1994) in support of this distinction between legal and equitable rulings. In that case, the District Court concluded that the relevant indemnification provision was insufficiently clear as a matter of Illinois law, *id.* at 327, and consequently "ignored the [provision] when allocating responsibility for cleanup costs." *Id.* at 326. In *dictum*, the Seventh Circuit concluded that this was error, reasoning that "although contractual arrangements between parties are not necessarily determinative of statutory liability, Lefton's intent to indemnify Kerr-McGee should be considered in the allocation of cleanup costs." *Id.* The court further explained that the fact that "Lefton -- with knowledge of the creosote on the site -- agreed that it took the property "as is" and would assume future liabilities resulting from that pollution is certainly a significant circumstance." *Id.* The court noted that "the fact that Kerr-McGee's predecessor Moss-American was the source of most of the pollution at the site may also weigh in the Court's analysis; this however is not reason to ignore other relevant considerations." *Id.* The issue of the appropriate weight to be accorded to each factor was not before the court, and the court had no occasion to suggest an answer to this question since it ultimately concluded that the indemnification provision did cover CERCLA liability, so no equitable allocation proceeding was required. *Id.* at 327-28.

law, and would place [the District] Court's decision at odds with the ruling made by the Court of Appeals." This conclusion does not follow from *Beazer I*.

The District Court, however, rejected Mead's contention that the Magistrate Judge had misinterpreted *Beazer I*. The court quoted from its penultimate paragraph, seemingly for the proposition that Mead's "fair share" of Beazer's response costs should be greatly influenced, if not largely determined, by Mead's relative contributions of hazardous waste to the site. The penultimate paragraph provides:

> Our refusal to construe Paragraph 4(c) as a clear promise by Beazer to indemnify Mead against CERCLA response costs leaves both Beazer and Mead responsible for their fair share of the cleanup costs associated with the Coke Plant. That result reinforces CERCLA policy. "Congress enacted CERCLA, a complex piece of legislation ... to force polluters to pay for costs associated with remedying their pollution." *United States v. Alcan Aluminum Corp.* 964 F.2d 252, 258 (3d Cir.1992).

34 F.3d at 219. Apparently, the District Court considered this quotation from *Alcan Aluminum* to support (or perhaps require) elevating the "polluter pays" principle above all other equitable factors.

The quoted paragraph does not warrant such significance. The first two sentences uncontroversially state that holding Mead and Beazer responsible for their fair share of cleanup costs reinforces CERCLA policy. *Id.* at 219. The next sentence, the quotation from *Alcan Aluminum*, is to the effect that Congress intended that polluters pay for the costs of remedying their pollution. *Id.* (quoting *Alcan*, 964 F.2d at

258).[21] The District Court apparently inferred from the juxtaposition of these statements that each party's "fair share" must be more or less rigidly tied to its share of pollution at the site. Such an interpretation is, however, fundamentally at odds with CERCLA's contribution provision as well as with CERCLA's policy of favoring private indemnity agreements.

We note, moreover, that in the footnote at the end of the penultimate paragraph, the *Beazer I* Court quoted the "equitable factors" language of section 9607(a) and went on to note that on remand, "the trial court will have to revisit the parties' contribution claims and correspondingly apportion liability for attendant CERCLA response costs." This direction is significantly broader than a direction that liability should be apportioned to reflect each party's share of pollution at the site - which the *Beazer I* Court could easily have stated if that were its intent.

It is clear, then, that the District Court erred in eliminating significant consideration of the parties' intent in its *equitable* allocation. See *Kerr-McGee*, 14 F.3d 321, 326 ("Although contractual arrangements between parties are not necessarily determinative of statutory liability, Lefton's intent to indemnify Kerr-McGee should be considered in the allocation of cleanup costs."). Moreover, to the extent that the court felt itself bound by the "polluter pays" principle or by our oblique reference to that principle in *Beazer I*, that conclusion was unwarranted. Because we conclude that the District Court's ultimate allocation of Beazer's costs was

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[21] *Alcan Aluminum* had nothing to do with contribution actions under § 113(f); the issues considered in *Alcan Aluminum* bore on Alcan's initial liability under CERCLA and to what degree it was required to reimburse the *government* for clean-up costs. *See* 964 F.2d at 259, 267-71.

predicated in large part on this error, that conclusion was an abuse of discretion.

Mead would have us go further and prescribe that the purchase agreement factors must be prioritized on remand, but we think this is inappropriate. CERCLA places both the selection and weighing of equitable factors in the sound discretion of the district court, not the appellate court. Accordingly, we leave these matters for the District Court to decide on its own on remand, unfettered by the legal errors discussed above.

D. Any Declaratory Judgment Should Contain a Contingency Provision.

Finally, we are sympathetic with Mead's contention that the District Court's declaratory judgment fixing the parties' equitable shares of future response costs should contain a provision authorizing the parties to re-litigate the District Court's equitable allocation if new facts or future events render the current division inequitable. For example, Mead argues that once the investigatory phase of the case concludes and the remedial phase ensues, the District Court's equitable allocation would no longer be fair if any required remediation is "primarily or exclusively directed to those areas of the Site where Beazer is responsible for the majority of the contamination."

Because the equitable allocation proceeding in this case must be conducted again on remand by the District Court, the declaratory judgment already entered in this case is null and void. If and when the District Court enters a new declaratory judgment covering future costs, however, we agree with Mead that the judgment should contain some kind of provision authorizing the parties to re-litigate the allocation of those

costs for good cause shown in response to *new events* or *new evidence* that would reasonably bear upon the equity of the allocation. Such contingency provisions are generally favored in CERCLA contribution actions, *see United States v. Davis*, 261 F.3d 1, 45 (1st Cir. 2001) (quoting contingency provision imposed by district court); *Acushnet Co. v. Coaters, Inc.*, 972 F. Supp. 41, 69 (D. Mass. 1997); *Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1142 (D. Or. 1996), and we agree with the wisdom of those cases. We leave the specific design of the provision to the discretion of the District Court, with the help of the parties. We recognize Beazer's concern that Mead might use such a provision to re-litigate issues that will have already been decided in the equitable allocation proceeding to be conducted on remand, but we think this concern can be adequately addressed by application of the 'law of the case' doctrine.[22]

VI. Conclusion

For the reasons stated above, we will reverse the judgments of the District Court and remand this action for further proceedings consistent with this opinion.

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[22] Finally, contrary to Beazer's suggestion, Federal Rule of Civil Procedure 60(b) is insufficient to protect Mead's rights if new events render the initial allocation inequitable because motions based on new evidence brought under that rule must be made "not more than one year" after the judgment was entered.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed October 8, 2002]

Civil Action No. 91-408

BEAZER EAST, INC.,	)
	)
Plaintiff,	)
Counterdefendant,	)
	)
v.	)
	)
THE MEAD CORPORATION,	)
	)
Defendant,	)
Counterclaimant,	)
Third-Party Plaintiff,	)
Third-Party Counterdefendant,	)
	)
v.	)
	)
KOPPERS INDUSTRIES, INC.,	)
	)
Third-Party Defendant,	)
Third-Party Counterdefendant.	)
	)

ORDER OF COURT

AND NOW, to-wit, this 8th day of October, 2002, IT IS ORDERED that a declaratory judgment be, and the same hereby is, issued in this civil action incorporating by reference the Opinion and Order of this court entered on August 29, 2002 (Document 345), and all other substantive rulings of this court in this civil action including, but not limited to, specifically its rulings and orders declaring defendant, The Mead Corporation, ("Mead") liable to plaintiff, Beazer East, Inc., ("Beazer") for 67.5% of all of Beazer's necessary response costs incurred consistent with the National Contingency Plan ("NCP") at the Woodward Coke Plant, located in Dolomite, Alabama.

IT FURTHER IS ORDERED that Beazer timely shall submit invoices for such costs to Mead for review and payment; and, in the event that Mead has objections to the costs submitted by Beazer, based on challenges to the necessity and/or NCP-consistency of those costs, those objections shall be filed by Mead with the court for resolution. Mead shall have forty-five (45) days from the receipt of Beazer's Submission to Mead of the costs which Beazer deems to be recoverable response costs within which to file with the court Mead's objections to the recoverability of such costs along with a brief in support thereof; Beazer shall have thirty (30) days after receipt of Mead's objections to file with the court Beazer's response thereto and brief in support thereof.

/s/_____

Gustave Diamond
United States District Judge

cc: Mark D. Shepard, Esq.
D. Matthew Jameson III, Esq.
Melissa L. Evans, Esq.
Babst Calland Clements & Zomnir, P.C.
Two Gateway Center, Eighth Floor
Pittsburgh, PA 15222

Jill M. Blundon, Esq.
Beazer East, Inc.
One Oxford Centre, Suite 3000
Pittsburgh, PA 15219

Van Carson, Esq.
Squire, Sanders & Dempsey L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44114, 1304

Charles R. McElwee, II, Esq.
Squire, Sanders & Dempsey L.L.P.
One Maritime Plaza, Suite 300
San Francisco, CA 94111

David E. White, Esq.
Thorp, Reed & Armstrong
One Riverfront Center
Pittsburgh, PA 15222

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 01-408

[Dated September 19, 2002]

BEAZER EAST, INC.,	)
Plaintiff,	)
	)
v.	)
	)
MEAD CORPORATION,	)
Defendant.	)
	)

ORDER OF COURT

AND NOW, to-wit, this 19th day of September, 2002, IT IS ORDERED that on or before September 26, 2002, counsel for the plaintiff will provide the court and counsel for the defendant with a proposed declaratory judgment to be entered in this case along with a brief memorandum in support thereof; and,

IT FURTHER IS ORDERED that on or before October 3, 2002, counsel for the defendant will provide the court and counsel for the plaintiff with defendant's response to plaintiff's submission and, if appropriate, defendant's proposed declaratory judgment along with a brief memorandum in support of its position.

/s/_____
Gustave Diamond

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed September 17, 2002]

Civil Action No. 91-408

BEAZER EAST, INC.,	)
Plaintiff,	)
	)
v.	)
	)
THE MEAD CORPORATION,	)
Defendant.	)
	)

ORDER OF COURT

AND NOW, this 17th day of September, 2002, in accordance with the stipulation of plaintiff, Beazer East, Inc. and defendant, The Mead Corporation (Document No. 348) approved by the court on September 16, 2002, IT IS ORDERED that prejudgment interest in the amount of $1,538,164.03 be, and the same hereby is, added to the judgment in favor of Beazer East, Inc. and against The Mead Corporation entered by the court on the 29th day of August, 2002.

/s/_____
Gustave Diamond
United States District Judge

CC: Mark D. Shepard, Esq.
D. Matthew Jamison III, Esq.
Melissa L. Evans, Esq.
Babst, Calland, Clements & Zomnir
Two Gateway Center, Eighth Floor
Pittsburgh, PA 15222

George P. Faines, Esq.
John H. Bingler, Jr., Esq.
Thorp, Reed & Armstrong
One Oxford Centre, 14th Floor
Pittsburgh, PA 15219-2402

Alan M. Wiseman, Esq.
Thomas A. Isaacson, Esq.
Howrey & Simon
299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Van Carson, Esq.
Charles R. McElwee, II, Esq.
Squire, Sanders & Dempsey
127 Public Square
4900 Key Tower
Cleveland, OH 44114-1304

John E. Frey, Esq.
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive
30th Floor
Chicago, IL 60606-1225

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

[Filed August 29, 2002]

Civil Action No. 91-408

BEAZER EAST, INC.,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE MEAD CORPORATION,	)
	)
Defendant.	)
	)

ORDER OF COURT

AND NOW, this 29th day of August, 2002, in accordance with the opinion filed this day, IT IS ORDERED that judgment be, and the same hereby is, entered in favor of Beazer East, Inc., and against The Mead Corporation in the amount of $3,243,467.80. This award is subject to the addition of prejudgment interest as calculated in accordance with the court's rulings;

IT FURTHER IS ORDERED that counsel for the parties shall apply the ~~court~~'s rulings on prejudgment interest to the response costs awarded by the court and stipulate to the applicable amount of prejudgment interest on or before September 11, 2002; and,

IT FURTHER IS ORDERED that on or before September 11, 2002, each party shall show cause why a declaration of liability, in accordance with the findings and rulings of the court to date will not provide the parties with adequate relief for the response costs incurred and to be incurred in implementing the administrative order of consent.

/s/_____
Gustave Diamond
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA**

Civil Action No. 91-408

[Filed August 29, 2002]

BEAZER EAST, INC.,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE MEAD CORPORATION,	)
	)
Defendant.	)
	)

OPINION

DIAMOND, D.J.

Beazer East, Inc. ("Beazer") commenced this action in March of 1991 under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") seeking contribution for expenses that have been and will in the future be incurred in cleaning up the Woodward Coke Plant, an industrial site near Dolomite, Alabama. The site consists of approximately 170 acres. Coke used in the steelmaking industry was produced at an 83-acre plant on the site from 1911 until 1998 when the plant was deactivated. The plant was demolished in 1999. Beazer seeks recovery against the Mead Corporation ("Mead") as a prior owner and

operator of the site from 1911 to 1974. Mead asserted a counterclaim against Beazer as prior owner and operator of the site (1974 to 1988) and joined the current owner of a portion of the site and operator of the plant from 1988 to 1998, Koppers Industries, Inc. ("KII"). Mead's third-party claim against KII effectively was resolved in a prior phase of the litigation that determined each party's proportional responsibility for Beazer's recoverable response costs. In the current phase of the litigation Beazer and Mead dispute which of Beazer's specifically claimed environmental costs incurred through December 31, 1999, properly are recoverable in a contribution, action under 42 U.S.C. §9613(f). Presently before the court are Beazer and Mead's revised proposed findings of fact and conclusions of law submitted after a three-day non-jury trial commencing on February 4, 2002. For the reasons set forth below, the court will enter judgment in Beazer's favor in accordance with the rulings rendered herein and direct the parties to stipulate to the applicable amount of prejudgment interest under the court's rulings.

The procedural history of this eleven year old complex CERCLA action is protracted and will only be briefly summarized here in light of the limited issues remaining for resolution. The first phase of the litigation concerned the parties' respective rights and obligations under the 1974 asset purchase agreement through which Beazer acquired the site from Mead; The parties filed cross-motions for summary judgment based on the indemnity provisions of that agreement and this court granted summary judgment in Mead's favor. Beazer appealed. The United States Court of Appeals for the Third Circuit reversed and remanded for further proceedings, explaining that the failure of the asset purchase agreement to require either party to indemnify the other left "both Beazer and Mead responsible for their fair share of the clean-up costs associated with the Coke Plant." Beazer East, Inc. v. Mead

Corp., 34 F.3d 206, 219 (3d Cir. 1994). The court further explained:

> On remand, the trial court will have to revisit the parties' contribution claims and correspondingly apportion liability for the attendant CERCLA response costs.

Id. at 219 n.10. During this phase of the litigation Mead was found to be a "responsible party" within the meaning of 42 U.S.C. §9607(a) and thus "for the purposes of CERCLA liability." Id. at 218, 219 n.10.

Following the return of the action to this court it was remanded to Magistrate Judge Benson for further pretrial proceedings. After considering a report and recommendation and objections thereto, this court entered a memorandum order on July 8, 1996, granting in part and denying part Mead's motion for partial summary judgment and referring the matter back to the magistrate judge for a report (l) identifying the equitable factors to be considered in the parties' cross claims for contribution under 42 U.S.C. §9613(f) and (2) recommending a comprehensive allocation of Beazer's clean-up costs among the parties. See Memorandum Order of July 8, 1996 (Document 193). After lengthy proceedings that included a twelve-day hearing and the submission of over 47 ring binders containing approximately 1300 exhibits, the magistrate judge considered the equitable allocation factors advocated by the parties and issued a report on November 24, 1999, recommending proposed findings of fact and conclusions of law. (Document 303). As part of this process the magistrate judge recommended final allocation percentages reflecting each party's equitable share of the CERCLA response costs ultimately found to be recoverable.

Each party filed objections to the magistrate judge's report. On March 7, 2000, this court issued a memorandum and order granting in part Mead's objections and adopting the report as this court's findings of fact and conclusions of law. The court determined that "Mead is, in fact, responsible for placing most of the contamination at the Woodward Coke Plant" and under the most precise calculations available "Mead placed approximately 90% of the waste on site." Findings of Fact and Conclusions of Law (Document 303) at pp. 96-97. After considering a number of other factors which were found to be relevant in apportioning the parties' responsibilities for recoverable response costs, the court's order provided:

> The final, costs found recoverable in this action shall be allocated as follows: The Mead Corporation - 67.5%; and Beazer East, Inc. - 32.5%.

Memorandum Order of March 7, 2000 (Document 308). During this "allocation phase" of the case the parties agreed that determinations regarding the recoverability of specific costs would be left to a later phase in the litigation. See Proposed Findings of Fact and Conclusions of Law of November 24, 1999 (Document 303) at p. 17 n.6); Joint Pretrial Stipulation (Document 320) at p. 3, ¶4.

After the parties appeared before the court for a conference on March 21, 2000, an order was entered on April 5, 2000, setting forth the procedures and compliance dates for the completion of the current phase of the litigation. The purpose of this phase is to determine which of the specific costs incurred by Beazer prior to December 31, 1999, are CERCLA response costs for which Beazer is entitled to contribution from Mead. See Joint Pretrial Stipulation at ¶5.

At the commencement of this phase of the litigation Beazer presented Mead with invoices totaling $5,008,709.00. The parties agree that at least a portion of these invoices reflect response costs at the site and that with minor exceptions these cost documents are genuine business records of Beazer and represent costs actually incurred by Beazer on or before December 31, 1999. Id. at ¶¶ 24 & 28. They further agree that at least $1,960,811.00 to $2,706,273.00 represent recoverable response costs incurred by Beazer and that Mead bears a 67.5% responsibility for such costs. Id. at ¶¶ 29-30. Beazer's cost documents reflecting its claimed response costs through December 31, 1999, were admitted into evidence at the trial. See Clerk's Memorandum (Document 336) at p. 4.

After reviewing Beazer's proffered cost documents Mead asserted that certain portions of them were not necessary response costs under CERCLA and/or were not costs incurred consistent with the National Contingency Plan ("NCP"). Mead segmented its challenges into four categories: (1) post risk assessment costs, (2) unnecessary sampling costs, (3) programmatic activity and (4) inadequate documentation. See Mead's Pretrial Brief in Support of Judgment (Document 324) at p. 25. After reviewing Mead's challenges, Beazer reduced its claimed Costs to $4,993,488.00 to account for any possible duplication or inadequate documentation identified by Mead. Trial Transcript ("TT") of February 4, 2002 (Muck) at 116-121; Plaintiff's Demonstrative Exhibits D-43 & D-45. Beazer contended that many of Mead's remaining objections to the specific invoices previously had been litigated and highlighted in its pretrial brief several of the court's prior findings and rulings, arguing that they essentially resolved most of Mead's challenges to the cost documents.

In the pretrial stipulation the parties raised the issue of the preclusive effect of the court's prior rulings on the issues raised in this phase of the litigation. On January 22, 2002, the court issued a memorandum advising the parties that it would not "revisit factual or legal issues that have been considered and resolved in the process of arriving at the percentages assigned to the respective parties for equitable allocation and accordingly the [instant] phase of this litigation [would] be limited to the consideration of matters beyond those previously addressed and resolved by the court." Memorandum and order of January22, 2002 (Document No. 330) at p. 2. The order accompanying the memorandum specifically provided:

> The evidence presented at the [instant] phase of this litigation shall be limited to whether the specific invoices Beazer produced to Mead for activities at the site through December 31, 1999, reflect recoverable response costs, within the meaning of 42 U.S.C. §9613(f). The court will give preclusive effect to its prior findings of fact and conclusions of law and the litigation will be limited to the remaining matters raised in the parties' submissions filed pursuant to the court's pretrial order of April 5, 2000. The parties shall prepare for trial accordingly[.]

Id. at p. 8. At trial Mead insisted that the prior proceedings did not resolve its "necessary" and "consistency" defenses as they relate to Beazer's specific cost documents. The Court permitted the introduction of evidence and argument concerning Mead's objections to the extent it did not clearly seek to revisit, circumvent or avoid the court's previous findings and rulings with the expressed understanding that the previous findings and rulings would be given full force and

effect. See TT of February 4, 2002 (Document 337) at pp. 21-26. Those findings and rulings are incorporated herein.

The historical basis for Beazer's contribution claim arose as a result of its compliance with (1) initial requests by and (2) subsequent administrative orders entered into with the United States Environmental Protection Agency ("EPA") and the Alabama Department of Environmental Management ("ADEM"). The site became the target of investigations by the EPA and ADEM in the early 1980's after the Resource Conservation and Recovery Act ("RCRA") became effective. Initial soil, surface water and sediment testing was conducted in 1985 and groundwater monitoring programs were initiated in 1986. These activities were performed by Beazer, the EPA and ADEM and the collected data was used by the EPA as part of its initial investigation and characterization of the site. The EPA advised Beazer that historical treatment and disposal of hazardous wastes at the site were a concern under RCRA. Beazer notified Mead on September 18, 1986, that historical waste disposal practices at the site might become the subject of a RCRA §3008(h) corrective action order and invited Mead to join Beazer in negotiating with the EPA regarding any required corrective action pursuant to a mutually agreed upon method of sharing Costs. Mead denied any responsibility for the historical waste disposal practices at the site on the ground that the asset purchase agreement made Beazer solely responsible for all such practices.

On March 22, 1988, Beazer notified Mead that an EPA contractor was about to conduct a facility assessment at the site "to investigate prior disposal activities at the plant" and invited Mead to be present and observe the process. Mead declined. On November 28, 1990, Beazer notified Mead of its receipt of a proposed administrative order of consent

("AOC") prepared by the EPA and again invited Mead to participate in the negotiation of a final order. Mead declined.

On July 8, 1991, Beazer and the EPA became parties to an AOC entered under §3008(h) of RCRA. The order made a finding that "the hazardous waste and/or hazardous constituents identified [during prior sampling at the site] pose a threat to human health or the environment" and that there had "been a release of hazardous waste and/or hazardous constituents into the environment from the facility." AOC (Plaintiff's Trial Exhibit 443) at 4, 7. The AOC directed Beazer to develop a work plan "designed to define the presence, magnitude, extent, direction and rate of movement of any hazardous wastes and/or hazardous constituents, within and beyond the Facility boundary," and

> to conduct those investigations necessary to: (1) characterize the potential pathways of contaminant migration; (2) characterize the source(s) of contamination; (3) define the degree and extent of contamination; (4) identify actual or potential receptors; and (5) support the development of alternatives from which a corrective measure will be selected by EPA.

Id. at 8. The EPA concluded that the actions required by the AOC "are necessary to protect human health or the environment" and it further reserved the right to "determine that certain tasks, including investigatory work or engineering evaluations, are necessary to protect human health or the environment in addition to the tasks and deliverables included in the work plans [to be developed and performed by Beazer] when new information indicates that such additional work is necessary." Id. at 7, 10.

A RCRA facility investigation ("RFI") was initiated to satisfy the obligations set forth in the AOC. Its overall objectives were to:

- Characterize the nature and extent of constituents of interest("COI") within and beyond the facility boundary;

- Determine and characterize the sources of COI;

- Define and characterize the potential pathways of constituent migration;

- Identify and characterize actual and potential human and environmental receptors and assess the potential risks posed to such receptors; and

- Gather the data necessary to support the development, evaluation and selection of corrective measures or alternatives, as necessary.

RFI (Plaintiff's Trial Exhibit 443) at pp. 1, 2; AOC at p. 8. Beazer's contractor submitted an RFI work p[illegible] in September of 1991, which was approved by the EPA. The RFI obligated Beazer to characterize the hydrogeologic conditions, soil and rock units, surface water and sediment, and topographical and climatic conditions at the site. RFI at pp. 12-16. The RFI was designed to investigate the entire site as a hole due to its size, the close proximity of the various hazardous substances and areas of concern, the similarity of COI among the potential source areas, the technical difficulty of segmenting potential releases from any particular area and the need to focus on the common potential migration pathways at the site. Findings of Fact and Conclusions of Law (Document No. 303) at pp. 20-21.

RFI Phase I activities began on February 3, 1992. Major Phase I activities included soil borings, test pits, soil sampling, monitoring well installation and groundwater sampling, aquifer characterization, surface water and sediment investigation, preliminary ecological investigation and additional groundwater sampling. Joint Pretrial Stipulation at ¶15. RFI Phase II activities began on September 11, 1995, and concluded on September 24, 1996. Major activities during this phase included preliminary planning, site reconnaissance, dye tracer study, natural potential survey and magnetometer survey, surface water and sediment sampling, ecological and wetlands reconnaissance survey, soil boring and sampling, coke and coke fill sampling, monitoring well installation and groundwater sampling, downhole geophysical surveys, aquifer pump test, and pipeline testing. Id. at ¶16.

Beazer submitted a draft Phase I and II RFI and groundwater quality assessment report to the EPA and ADEM on March 7, 1997. The report included a risk assessment prepared by Beazer's contractor, Ogden Environmental, and a response to ADEM's requirement that Beazer complete a groundwater quality assessment. The risk assessment advanced and sought to support the proposition that estimated non-cancer and excess lifetime cancer risks posed by the site are within acceptable target ranges. Beazer is still waiting for the environmental agencies' formal substantive response to its report and risk assessment.

In March of 1999, Beazer submitted a Site Conceptual Model for groundwater flow and in April of 2000, ADEM required Beazer to submit a draft Phase III RFI work plan outlining the means by which additional groundwater sampling would be conducted. The Phase III investigation is designed to identify the potential migration of hazardous

substances into the groundwater beyond the boundaries of the site. Its primary focus is on the flow patterns of deeper and off-site ground water.

Beazer employed a multi-tiered process to identify, verify, monitor and segregate the environmental costs initiated at the site pursuant to the AOC. A project/environmental manager was assigned to the site. TT of February 4, 2002, (Brourman) at 31, 54. This individual assisted in the selection of environmental consultants that performed environmental work at the site and oversaw the work they performed. Id. at 54-55. Compliance with NCP requirements was always a goal and numerous steps were taken to achieve that goal, including quality control of the data collected, use of accredited laboratories, developing a community relations plan and so forth. Id. at 56.

When an invoice from an environmental consultant or outside contractor reflecting work undertaken to comply with the AOC was reviewed by Beazer, it was subjected to a multi-level review process. Id. at 57. The invoice was reviewed by the accounting department and a tracking label providing key information needed in the verification process to follow was attached to it. Id. at 58. The accounting department reviewed any numbers or mathematical computations appearing on the invoice, cross referenced it to the specific location and the applicable work order, and performed any other pertinent administrative verification. Id. The invoice would then be forwarded to Beazer's project/environmental manager for technical review. This included verifying that the work was in compliance with the purchase order and any applicable change orders, and was otherwise consistent with the objectives and actual work being performed at the site. Id. at 59-60. All invoices were coded to a specific site and at Woodward Coke the invoices also were correlated to the

specific tasks outlined in the AOC. Id. at 62. The project/environmental manager would then perform a breakdown of any specific charges for individual tasks to verify their accuracy and compliance with the governing, purchase order. Id. Additional data or explanatory material was requested from the consultant whenever necessary. Id. at 64. After completion of the technical review the invoices were returned to the accounting department for payment. Id. at 58. Payments for larger amounts required explicit approval from Beazer's chief financial officer. Id.

A multi-level review process also was undertaken to segregate the cost documents Beazer tendered to Mead. Initially the accounting department was given a beginning and ending date for the retrieval of invoices. TT of February 4, 2002 (Muck) at 116. All invoices within that time frame that were coded to Woodward Coke were pulled from Beazer's environmental, cost ledgers. Id. Then each invoice was reviewed to verify that it was a true cost attributable to complying with the AOC. Id. at 127. During this process various expenses that were not true environmental costs attributable to the implementation of the AOC were deducted. Id. at 118, 126. This review was undertaken by Beazer's chief financial officer, Karen Mance, with assistance from the technical staff, including the project/environmental manager. Id.; Deposition of Karen Mance (Document 333) at 11. She reviewed the invoices and eliminated costs such as property management costs, plant operation costs, outside counsel fees, and travel costs of internal personnel connected to the instant litigation or not specifically related to the implementation of the AOC. Id. at 11-16. Other amounts such as costs estimated to be attributable to groundwater monitoring and quality assessment for a RCRA regulated unit not associated with Mead's operation of the plant were then computed and deducted. TT of February 4, 2000 (Muck) at 118; Mance

Deposition at 12. These calculations were made with the assistance of technical personnel and in-house counsel and were based upon the hypothetical costs of installing four groundwater wells and the estimated costs of monitoring them. Mance Deposition at 12-13.

As previously noted, Beazer has produced to Mead and submitted into the record approximately 3,600 pages of invoices to support the costs it contends are recoverable response costs. Beazer has categorized these costs into the following categories: groundwater quality assessment, outfall area study, remedial field investigation, risk assessment, waste disposal, RFI work plan, monitoring outfall (plant lake), Part B post-closure permit application, travel - legal and technical, community relations, and conceptual design - lagoon remediation. Beazer's cost documents are professionally organized and easy to reference.

Beazer does not dispute its obligation to prove its invoices reflect recoverable response costs incurred at the site on or before December 31, 1999. It asserts it has presumptively and factually done so. In other words, Beazer argues that the circumstances leading to and surrounding the implementation of the AOC coupled with a review of its technical requirements establish that the generated invoices were necessary costs of response incurred consistent with the NCP. It further argues that the AOC is the functional equivalent of a CERCLA §106 or §122 order and the cost documents as a whole (1) identify the source of the release and the response actions taken, (2) accurately account for the costs incurred, and (3) identify the risks to public health and the environment; all of which demonstrate compliance with the applicable regulations and provisions of the NCP and indicate Beazer's claimed costs were incurred as part of an undertaking designed to produce a CERCLA quality clean-up.

Mead contends in general that Beazer has applied an inappropriate standard for determining whether its investigative costs are recoverable response costs. It argues that the work performed pursuant to the AOC should not be presumed to meet the necessary and consistency requirements of CERCLA. And, even if such a presumption is appropriate, a specific review of Beazer's cost documents assertedly demonstrates a significant amount of the costs were not incurred pursuant to the AOC and/or were not "necessary costs of response" or "incurred consistent with the NCP." From Mead's perspective the cost documents continue to reflect non-recoverable expenditures in the form of (1) double billing/inadequate documentation, (2) programmatic costs incurred in complying with independent environmental regulatory programs, (3) unrecoverable post risk assessment costs and (4) unnecessary sampling costs.

Beazer sufficiently has demonstrated the costs it incurred in complying with the AOC were generated in a setting that presumptively satisfies CERCLA's necessary and consistency requirements. The record also demonstrates that as a whole Beazer's cost documents do reflect necessary costs of response incurred consistent with the NCP that were generated as part of an environmental remediation effort designed to produce a CERCLA quality clean-up. Accordingly, Beazer's claimed response costs are presumptively recoverable and Beazer is entitled to recover its claimed costs unless Mead's specific challenges have led the court to conclude otherwise.

"Congress enacted CERCLA, a complex piece of legislation ... to force polluters to pay for costs associated with remedying their pollution." Beazer East, 34 F.3d at 219 (quoting United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir.1992)). CERCLA is a remedial statute

which is to be construed liberally to effectuate its goals and one of its principal concerns is assuring that those who are responsible for environmental conditions bear the costs of remedying those conditions. Id. (citing, inter alia, B.F. Goodrich v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992)). Generally, CERCLA initially imposes strict liability on potentially responsible parties. With limited exception, a potentially responsible party who has incurred costs associated with hazardous substance clean-up and site remediation may recoup that portion of its expenditures which exceed its fair share of the overall liability through the contribution and equitable apportionment mechanism engrafted into CERCLA by the Superfund Amendments and Re-Authorization Act, 42 U.S.C. §9613(f). See New Castle County v. Halliburton NVS Corp., 111 F.3d 1116, 1122 (3d Cir. 1997).

A private party may recover contribution under CERCLA for any "necessary costs of response incurred ... consistent with the national contingency plan." 42 U.S.C. §9607(a)(4)(B); see also 40 C.F.R. §330.700(c)(2). The party seeking contribution has the burden of demonstrating that its identified costs satisfy both the necessary and consistency requirements of the statute. Foster v. United States, 926 F.Supp. 199, 203 (D.D.C. 1996). Also, as a general matter response costs must have been incurred in a reasonable manner. Langford-Coaldale Water Authority v. Tonolli Corp., 4 F.3d 1209, 1219 (3d Cir. 1993); Northwestern Mutual Ins. Co. v. Atlantic Research, 847 F.Supp. 389, 401 (E.D.Va. 1994). In other words, costs incurred for needless measures that do not come within the ambit of CERCLA's necessity and consistency requirements are not recoverable. Id.

Beazer is entitled to seek contribution for all necessary "response costs associated with a release or threatened release of hazardous materials." 42 U.S.C. §9607(a)(4)(B).

"'Response' [under CERCLA] means remove, removal, remedy, and remedial action." 42 U.S.C. §9601(25). "Removal" includes "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances ...." 42 U.S.C. §9601(23). Thus, CERCLA contemplates that investigative costs incurred to assess, characterize and evaluate the threat of a release are response costs. See, e.g, Bowen Engineering v. State of Reeve, 799 F.Supp. 467, 476 (D.N.J. 1992) (citing Jones v. Inmont Corp., 584 F.Supp. 1425, 1429 (S.D.Oh. 1984)).

In order to prove its identified costs satisfy the necessity requirement, Beazer must prove "(1) that the costs were incurred *in response* to a threat to human health or the environment and (2) that the costs were necessary to address that threat." Foster, 926 F.Supp. at 203 (quoting G.J. Leasing Co. v. Union Elec. Co., 854 F.Supp. 539, 561 (S.D.Ill. 1994) (emphasis in original)). In the area of investigatory costs this requirement generally is understood to mean that "a claimant's investigatory costs must be precipitated by a release of a hazardous substance and necessary to the remediation thereof." Id. (citing Gache v. Town of Harrison, 813 F.Supp. 1037, 1046 (S.D.N.Y. 1993) & Artesian Water Co. v. Government of New Castle County, 659 F.Supp. 1269; 1278 (D.Del. 1987)). The threat to public health or the environment must be actual and real. J.G. Leasing Co., 854 F.Supp. at 562 (citing Matter of Bell Petroleum Services, Inc., 3 F.3d 889, 904-906 (5th Cir. 1993)). A hypothetical threat is insufficient. Id. In addition, the release or threatened release must have caused the claimant to have incurred the response costs. Id. (citing 42 U.S.C. §9607(a)(4); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 872 F.2d 453, 459 (1st Cir. 1992)).

The EPA has determined that all actions undertaken to comply with the AOC are a necessary response to a release and ongoing threat of release of hazardous substances into the environment and are actions needed to protect human health or the environment. In the AOC the EPA made a finding that "[t]here has been a release of hazardous waste and/or hazardous constituents into the environment." AOC (Plaintiff's Trial Exhibit 443) at §V(4). It further determined that all actions required under the AOC are "necessary to protect human health or the environment." Id. at §V(5). These determinations were based upon the initial and subsequent investigations and sampling at the site which confirmed that there had been a release of hazardous substances within the meaning of CERCLA. The EPA also determined that the ongoing investigation and characterization activities under the AOC are necessary and appropriate steps toward assessing potential measures designed to select feasible and reasonable measures to clean-up the site and eliminate the threat of a future release. The EPA's determinations were made within its area of technical expertise and are entitled to deference. See Commonwealth of Pa., Dept. of Environmental Resources v. U.S.E.P.A., 932 F.2d 269, 272 (3d Cir. 1991). It follows that Beazer's activities undertaken to comply with the AOC are costs incurred in response to a threat to human health or the environment and are necessary to address that threat.

Beazer has demonstrated sufficiently that in general its costs in complying with the AOC should enjoy a presumption of necessity and consistency under CERCLA. Mead's contention that such a presumption is inappropriate because the AOC was entered under §3008(h) of the RCRA is unpersuasive. While Mead correctly notes that the preamble to the 1990 NCP indicates a RCRA corrective action is not entitled to a presumption of necessity and consistency under

CERCLA merely because it requires a private party to conduct clean-up activities, see Mead's Brief in Support of Judgment (Document 341) at p. 7, it equally is clear that response actions undertaken pursuant to RCRA can justify presumptive cost recovery under CERCLA where the activities are from a technical perspective analogous to those that would have been required under an order issued by the EPA pursuant to §106 or §122 of CERCLA and the costs incurred are substantially similar to those that would have been incurred under CERCLA. Those circumstances are present here.

The AOC is the functional equivalent of and mandates a substantially similar process to what would be required under a §122 administrative order on consent under CERCLA. As a general matter the investigatory and characterization components of a response action under CERCLA begin with a remedial preliminary assessment ("PA") and a remedial sight inspection ("SI"). See 40 C.F.R. §300.420. "A remedial PA shall consist of a review of existing information about a release such as information on the pathway of exposure, exposure targets, and source and nature of release." 40 C.F.R. §300.420(a)(2). A PA report must include a description of the release, a description of the probable nature of the release, a recommendation on further action and a recommendation on whether a SI or removal action or both should be undertaken. 40 C.F.R. §300.420(4). If a SI is chosen, it must build upon the information gathered from the PA, involve both on and off site field investigation efforts and sampling, and utilize a process for obtaining data of sufficient quality and quantity to "achieve adequate data for use in site evaluation and hazard ranking system activities." 42 C.F.R. §300.425. If a remedial SI is performed, the lead agency performing the investigation must prepare a report containing:

(I) A description/history/nature of waste handling;
(ii) A description of known contaminants;
(iii) A description of pathways of migration of contaminants;
(iv) An identification and description of human and environmental targets; and
(v) A recommendation on whether further action is warranted.

Id. The entire process is designed to provide the data and information necessary to perform a remedial investigation/feasibility study and permit the EPA to select appropriate remedial actions. See 42 C.F.R. §300.430.

As noted above, the AOC obligates Beazer to engage in a substantially similar process. The AOC specifically required Beazer to complete a RCRA Facility Investigation Work Plan for the entire site which was "designed to define the presence, magnitude, extent, direction and rate of movement of any hazardous waste and/or, hazardous constituents, within and beyond the facility boundary." Id. at §VI(A)(1) & (2). As part of this process Beazer had to conduct the "investigations necessary to: (1) characterize the potential pathways of contaminant migration; (2) characterize the source(s) of contamination; (3) define the degree and extent of contamination; (4) identify actual or potential receptors; and (5) support the development of alternatives from which a corrective measure will be selected by the EPA." Id. at §VI(A)(2). Beazer also was required to submit both preliminary and final RFI reports to the EPA and develop a data collection quality assurance plan, a data management plan, a health and safety plan and a public involvement/community relations plan. Id. at §vi(A)(3). In fulfilling these obligations Beazer is required to provide monthly progress reports to the EPA and ADEM and the EPA

has expressly reserved the right to modify and/or make changes to all of Beazer's required submissions and deliverables. Upon completion of the RFI, the AOC obligates Beazer to submit a corrective measures study to inform the EPA's selection of a corrective measure or measures for the site. Id. at §VI(B)(4) & (5). Finally, the EPA may require Beazer to perform additional tasks, including investigatory work or engineering evaluations, if in its judgment such actions are necessary to protect human health or the environment due to the receipt of new information indicating "that such additional work is necessary." Id. at §VI(C)(11).

A comparison of the manner in which the release of hazardous substances at the site has been investigated reveals its substantial similarity with the general process to be employed under CERCLA and the NCP. The RFI work plan initiated a series of investigative measures designed to assess and characterize the nature of the release, the potential pathways of migration, the human and environmental receptors placed at risk by the migration and to provide the information necessary to make informed decisions about future action. The work was performed in incremental steps in order to permit the EPA or ADEM to expand or modify its scope based upon gained information. Internal and external data validation controls were maintained. Both on and off site sampling has been utilized and the entire process is designed to generate the information needed to evaluate remedial alternatives and select an appropriate remedial measure.

Moreover, each parties' expert witness offered an opinion on when investigation and characterization activities performed under an independent statute or regulation should be deemed presumptively consistent with costs that would be incurred under CERCLA. Both acknowledged that where investigative and pre-remedial activities have been undertaken

pursuant to an independent environmental statute or regulation, the resulting costs are recoverable under CERCLA if from a technical perspective the governing order is similar to a consent decree that would be entered under §122 of CERCLA. In fact, Mead's expert, Dr. Ball, acknowledged that when an independent consent order is similar to and structurally consistent with a model §122 CERCLA consent order from a technical perspective, then any costs incurred in implementing that order presumptively comply with CERCLA's necessity and consistency requirements. See TT of February 5, 2002 (Document 338) (Dr. Ball), at p. 137.

The AOC is conceptually similar to and from a technical perspective contains the functionally equivalent sections of the EPA's model administrative order on consent, for a remedial investigation/feasibility study under CERCLA. Compare Plaintiff's Exhibit 569 with Plaintiff's Exhibit 443; see also Testimony of Dr. Ball on Cross-Examination, TT of February 5, 2002, at pp. 132-38. And Beazer's expert, Jay Vandeven, directly and convincingly opined that (1) necessary costs of response under CERCLA include "costs and activities that are necessary to characterize the nature and extent of contamination at the site, develop data for risk assessment, and develop data for developing, analyzing and selecting a remedial alternative at a site" and (2) from a technical perspective the investigation at the Woodward Coke Facility would have progressed in essentially the same manner if it had been undertaken pursuant to CERCLA as opposed to RCRA. See Testimony of Jay Vandeven, February 5, 2002, Trial Transcript at pp. 48-49 and February 6, 2002, Trial Transcript at pp. 4-7.

Beazer's undertakings to comply with the AOC also are presumptively consistent with the NCP. The NCP is "a series of regulations promulgated by the EPA to establish

procedures, criteria and responsibilities for response actions conducted both by the government and private parties." The Reading Co v. City of Philadelphia, 823 F.Supp. 1218, 1239 (E.D.Pa. 1993) (quoting Ambrogi v. Gould, Inc., 750 F.Supp. 1233, 1238 (M.D.Pa. 1990)). To be consistent with the NCP from a substantive perspective, a private party's response actions must be aimed at bringing conditions at a toxic waste site into compliance with applicable environmental and public health requirements. Artesian Water Co., 659 F.Supp at 1296. Under the provisions of the 1990 NCP "a private party response action will be considered consistent with the NCP if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements ... and results in a CERCLA-quality clean-up."[1]

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[1] The parties each used the 1990 version of the NCP in conducting their review of Beazer's Cost documents. Since the passage of CERCLA in 1980, there have been three versions of the NCP in effect: 1982, 1985 and 1990. While it is understood that response costs are to be evaluated in conjunction with the NCP in force at the time the costs are incurred, the courts have generally agreed that the 1990 version merely clarified the standard of compliance set forth in the 1985 version and as a result most courts have applied the "substantial compliance" standard as clarified to costs incurred both before and after 1990. See Reading Co., 823 F.Supp. at 1239-1240; Nashua Corp. v. Norton Co., 116 F.Supp.2d 330, 353 (N.D.N.Y. 2000); Sherman-Williams Co. v. ARTRA Group, Inc., 125 F.Supp.2d 739, 753 (D.Md. 2000). The EPA chose the "substantial compliance" standard in order to ensure that cost recovery actions for meritorious clean-up activities were not defeated by a talismanic application of the NCP' s detailed requirements. 55 Fed.Reg. 8666, 8993 (1990). This court will employ the substantial compliance standard as well.

Consistency with the NCP also requires a private party to generate and maintain documentation to support all response and remedial actions taken at a site. "In general, [the] documentation shall be sufficient to provide the source and circumstances of the release, the identity of responsible parties, the response action taken, accurate accounting of federal, state or private party costs incurred for response actions, and impacts and potential impacts to the public health and welfare and the environment." 40 C.F.R. §300.700(c)(5)(ii). Beyond these general requirements "the NCP simply does not contain any specific standards concerning the documentation of costs." United States v. Findett Corp., 75 F.Supp.2d 982, 991 (E.D.Mo. 1999); United States v. Chrysler Corp., 168 F.Supp.2d 754, 759 (N.D.Ohio 2001). Nor do the regulations elaborate on what is meant by "accurate accounting" or "sufficient" documentation. Id. Consequently, compliance with the documentation and accounting requirements of the NCP can factually be satisfied through the submission of documentation and cost summaries that as a whole (1) identify the general nature of the action taken, (2) identify the cost incurred and (3) establish a nexus between the claimed cost and the response or remedial action taken or to be taken at the site. Id.

The practical inability of applying the detailed procedures, criteria and goal-oriented requirements of the NCP to pre-remedial activities undertaken to investigate, characterize and monitor a release or threatened release of hazardous substances when no remedial measures have been selected at a site has been recognized by essentially every court that has squarely considered the issue. See Donahey v. Bogle, 987 F.2d 1250, 1255-56 (6th Cir. 1993) ("Although consistency with the NCP is a necessary element for recovery of remedial costs, it does not necessarily follow that consistency with the NCP is required for recovery of monitoring or investigative

costs") following Carlyle Piermont Corp. v. Federal Paper Board Co., 742 F.2d 814 (S.D.N.Y. 1990), vacated on other grounds 512 U.S. 1201 (1994)); Artesian Water Co., 659 F.Supp. at 1294 ("the detailed NCP provisions governing other response actions cannot reasonably be applied to preliminary monitoring and evaluation of a release of hazardous substances"), affirm'd, 851 F.2d 643, 647 (3d Cir. 1988) (the plaintiff's failure to demonstrate consistency with the NCP led the district court "to deny recovery for all claims except for costs of monitoring, an instance where the procedural requirements were not pertinent"); Foster, 926 F.Supp. at 203 ("because the detailed NCP provisions governing other response action cannot reasonably be applied to preliminary monitoring and evaluation of a release of hazardous substances, ... investigatory costs are generally recoverable irrespective of their consistency with the NCP") (citing numerous additional cases in support) (citations omitted); Marriott Corp. v. Simkins Indus., Inc., 825 F.Supp. 1575, 1583 (S.D.Fla., 1993) ("courts that have considered the issue of investigatory costs' consistency with the NCP are in agreement that these costs are recoverable irrespective of their consistency with the NCP") (collecting cases); City of New York v. Chemical Waste Disposal Corp., 836 F.Supp. 968, 980 (E.D.N.Y. 1993) ("the costs of initial investigation and monitoring of a release are recoverable, however, without [showing they are consistent with the NCP]").

In light of the conceptual difficulties of applying the detailed remedial provisions of the NCP to initial investigation and monitoring costs, a number of courts have deemed CERCLA's consistency requirement to be satisfied where a private party's pre-remedial costs were undertaken in a manner designed to further the fundamental purposes of CERCLA: prompt detection of a release or threatened release

of hazardous substances and the removal or remediation of any such substance. See, e.g., HRW Systems, Inc. v. Washington Gas Light Co., 823 F.Supp. 318 344 (D.Md. 1993) (consistency with the NCP investigatory and will be deemed present where monitoring activities are designed to characterize the release, describe its probable nature and lead to recommendations regarding future actions); Northwestern Mutual Life Ins. Co. v. Atlantic Research Corp., 847 F.Supp. 389, 400-01 (E.D.Va. 1994) (investigatory activities undertaken to assess the nature of a release of hazardous substances at a facility and to identify feasible remedial alternatives are consistent with the NCP); Nashua Corp. v. Norton Co., 116 F.Supp.2d 330, 352-53 (N.D.N.Y. 2000) (costs incurred "at the preliminary remedial evaluation phase" in order to identify potential remedial measures and assess their feasibility sufficiently comply with the NCP).

A similar standard is appropriate in this case. The AOC obligates Beazer to conduct an in depth RFI investigation designed to generate sufficient data from which to characterize the nature and extent of the contamination at and beyond the site, identify and understand the sources of that contamination, identify and understand the pathways of the contamination and characterize the actual and potential ways in which the contamination poses risks to human health and the environment. Beazer's investigation and monitoring activities under the AOC are designed to characterize a known release of hazardous substances, describe the probable nature of that release and lead to recommendations regarding future action as to that release. The procedures being employed are designed to produce reliable data regarding all environmental mediums that potentially could be affected by the contamination. These activities have been and are being undertaken in accordance with direct oversight by the EPA and ADEM. It follows that the investigation and monitoring

activities undertaken at the site have been designed to characterize the release, described its probable nature, generate adequate data from which alternative remedial, measures can be identified, and lead to recommendations regarding future actions.

The AOC also is designed to lead to a CERCLA-quality clean-up. It obligates Beazer to perform a corrective measures study after completing a final RCRA facility investigation report. The stages of the RFI are designed to assure adequate data from which to analyze the risks presented. The object of the CMS is to identify and development alternative corrective measures, compare the effectiveness and efficiency of those alternatives and permit the EPA to select the most effective measures to remediate the site. See Exhibit B to the AOC, Plaintiff's Exhibit 443 at p. 5,172. Beazer's activities undertaken to comply with the AOC are thus designed to lead to an effective clean-up of the hazardous wastes present at the site and satisfy the general requirements needed to establish presumptive consistency with the NCP.

Finally, Beazer's cost documents sufficiently comply with the applicable requirements in 40 C.F.R. §300.700(c)(5) & (6). As a whole Beazer's cost documents sufficiently identify the source and circumstances of the release, the nature of the action taken to assess, characterize and monitor the nature of that release, the costs incurred as a result of the actions taken and the aspects of the AOC the activity was designed to achieve.

The AOC is substantially similar to a §122 administrative order on consent for a remedial investigation/feasability study under CERCLA. Beazer's investigative activities pursuant to the AOC are from a technical perspective the functional

equivalent of what would have been required under a CERCLA-based investigation. Beazer's investigative activities were as a general matter undertaken as a necessary response to a release and threatened release of hazardous substances that pose an imminent danger to human health and the environment. Beazer's investigation and monitoring activities have been performed in order to (1) characterize the release, (2) describe its probable nature, (3) generate adequate data from which alternative remedial measures can be identified and (4) provide the information necessary to make informed decisions about future remedial action. Beazer's activities performed to implement the AOC are designed to lead to a CERCLA-quality clean-up. Beazer has employed adequate and reliable methods to (1) identify the cost of its investigative and monitoring activities and (2) the purpose those activities served toward accomplishing the various components of the AOC. It follows that Beazer's cost documents presumptively meet the requirements governing a private party contribution action under CERCLA.

Mead contends four categories of Beazer's cost documents are non-recoverable because they either reflect activities that were not undertaken to comply with the AOC or are otherwise beyond the scope of CERCLA's recoverable response costs. These include: (1) instances of double billing or insufficient documentation, (2) programmatic costs incurred in order to comply with operational requirements under RCRA or the Clean Water Act ("CWA"), (3) post risk assessment costs and (4) the excessive and unneeded gathering of data at the site. Each of these categories is addressed below.

In its pretrial brief Mead identified a number of invoices allegedly reflecting instances of double billing. It also highlighted invoices that assertedly did not provide sufficient information to determine whether the claimed costs qualified

as a necessary cost of response. Prior to trial Beazer eliminated a number of its invoices in order to make adjustments for instances of alleged double billing. Notwithstanding these adjustments, Mead continues to contend that Beazer's cost documents reflect instances of double billing and similar nonrecoverable expenses.

Mead specifically challenges an invoice by Dow Environmental for "resampling" services in the amount of $55,984.76. See Plaintiff's Exhibit 565 at Bates No. 3249. Beazer's environmental manager at Woodward Coke, Mr. Brourman, explained that the invoice reflected the costs of validation for the resampling of data collected by another vendor. TT of February 4, 2002 (Document 337) at 71. The initial data could not be validated due to mistakes of the contractor gathering the samples, ES&E. Because ES&E was responsible for the mistakes leading to the need to resample, "ES&E voluntarily re-did the sampling and analysis at their costs, that include[d] both the field work and the laboratory portion." Id. at 71-72. However, Dow Industrial was paid for its quality assurance/quality control work for both the initial sampling and the resampling because it was not responsible for ES&E's mistakes and Beazer did not request ES&E to pay the Dow invoice on Beazer's behalf. It was Beazer's practice to avoid having one vendor collect directly from another; instead, Beazer would have paid one vendor and then demanded an off-setting credit from the other. TT of February 4, 2002 (Brourman) at 104. Beazer was unable to locate in its invoices any specific credit provided by ES&E to account for the portion of the Dow Environmental invoice of July 29, 1996, reflecting resampling charges. Under such circumstances Dow Environmental's resampling invoice of July 29, 1996, for $55,984.76 is not a recoverable response cost.

Mead attacks a series of invoices from a vendor known as "Dames & Moore." These invoices were submitted for community relations work. The invoices indicate the work was performed at Beazer's "wood treatment plant" in Dolomite, Alabama. See Plaintiff's Exhibit 561 at Bates Nos. 1850-60. Brourman explained that Beazer did not own a wood treatment plant in Dolomite and therefore the work had to have been done in conjunction with Woodward Coke. See TT of February 4, 2002 at 76. Mead notes that Brourman admitted on cross-examination that it was just as likely a scenario that the address of Woodward Coke in Dolomite, Alabama, had been entered in error as opposed to the designation of a "wood treatment plant." Id. at 83. Mead thus argues that the record demonstrates equally plausible scenarios and therefore Beazer has not met its burden.

The record contains sufficient evidence to support Beazer's treatment of the Dames & Moore invoices as attributable to Woodward Coke. First, Brourman noted in his direct testimony that the tracking sticker attached to the invoices by Beazer at the time the invoices were processed designated the activity to "582", the control number for the Woodward Coke plant. This designation was made on each Dames & Moore invoice included in Beazer's cost documents. Second, the invoices reflect a period of service commencing on July 27, 1991, which immediately followed Beazer's entry into the AOC. The AOC required Beazer to establish a community relations program. The invoices reflect the types of activities one would expert to be performed in developing and initiating a community relations program at a large RCRA site. Finally, the invoices reflect activity through November 1, 1991, which correlates to the time when complying with the community relations component of the AOC would have been appropriate and necessary. Under these circumstances

the record supports Beazer's inclusion of the Dames & Moore invoices in its cost documents.

Mead contends several of Beazer's invoices should be excluded because a reasonable person cannot utilize the supporting documentation to determine the nature of the actions taken and their relationship to Beazer's obligations under the AOC. It also challenges three invoices from ES&E that were designated as "non-billable charges" without further explanation. Mead identified these invoices in categories "D-1" and "D-2," in its trial exhibit "M-11."

In response Brourman indicated that when the invoices in these categories were received and processed by Beazer they were treated as environmental costs for activities at Woodward Coke and on that basis they were included in Beazer's recoverable response costs. Brourman was not able to provide any further information on the invoices in category "D-1." ES&E's project manager also was unable to provide further explanation regarding either category of invoices. Under these circumstances the invoices in the amount of $35,041.09 in category "D-1," were insufficiently documented and are not properly included in Beazer's recoverable response costs.

Beazer adequately met its burden of proof on the costs reflected in category "D-2." Brourman explained that the costs in "D-2" reflected work that was beyond the scope of ES&E's initial contract at the site but nevertheless was work that was essential to performing the contract. As part of ES&E's work in analyzing the field samples taken from the site, ES&E was asked to develop an electronic database from which the sample results could be examined and manipulated in different ways. ES&E agreed that a certain amount of its employees' time would be consume learning curve needed to

"get up to speed in figuring that exercise out" and as a result ES&E had agreed to charge Beazer only for what was "reasonable to expect of an experienced contractor." TT of February 4, 2002 at 73. A "non-billable charges" designation was used as an accounting mechanism to track separately the hours devoted to developing the electronic database. Beazer's employees reviewed the actual work performed to develop the database and Brourman approved the amounts billed to Beazer as reasonable for the services provided. Id. Beazer paid the approved invoices. Id. Analyzing the data generated from the field sampling was an essential part of formulating the risk assessment. Under these circumstances ES&E's "non-billable-invoices" were sufficiently connected to Beazer's obligations under the AOC and accordingly these charges are recoverable response costs.

Mead contends two types of costs should be eliminated because they represent programmatic operating costs incurred solely to comply with independent requirements under RCRA or the Clean Water Act ("CWA"): (1) national pollution discharge elimination system ("NPDES") costs (categorized by Beazer as outfall area study and monitoring: outfall plant lake costs); and (2) other RCRA costs (categorized by Beazer as groundwater quality assessment and part B post-closure application costs). Mead argues that Beazer incurred and would have incurred these environmental costs solely as a function of independent environmental regulations applicable to its ongoing operations of the plant and therefore they are independent of the historical disposal practices addressed through the AOC. Specifically, Mead identifies $37,079.72 in costs which it claims are nonrecoverable NPDES costs tied solely to Beazer's compliance with the CWA during the

ongoing operation of the plant.[2] The record does not support Mead's contention that these costs did not serve any purpose in Beazer's compliance with the AOC and were incurred solely as a result Df independent environmental regulations.

In the prior phase of this litigation Mead argued that its liability to Beazer should not include programmatic costs that Beazer would have incurred separately from its costs of complying with the AOC. Arguments concerning this issue were raised by both parties' experts and after considering Mead's objections to the magistrate judge's proposed findings of fact and conclusions of law, this court concluded that "even assuming that some undertakings may coincidentally serve a dual purpose for Beazer, this factor in itself does not make such undertakings unnecessary for proper monitoring and remediation of the site." Memorandum and Order of Court of March 7, 2000 (Document 308) at 17. Mead has advanced no authority to undermine the court's determination.

Moreover, contrary to Mead's assertions in its post-trial brief in support of judgment, the record adequately demonstrates that the various costs Mead has placed into its "programmatic costs" category were incurred as part of Beazer's compliance with the AOC and thus represent necessary costs of response incurred consistent with the NCP. Mead essentially concedes that if the activities within this category were necessary to comply with any aspect of the AOC, then they properly are included in Beazer's recoverable

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[2] Separate and apart from the obligations set forth in the AOC, ADEM's regulations required Beazer to perform a groundwater quality assessment at the site. Beazer obtained permission from ADEM to combine its groundwater quality assessment obligations with its groundwater monitoring activities required under the RFI.

response costs. See Mead's Post-Trial Brief in Support of Judgment (Document 341) at 18 ("To the extent that costs were incurred in the RCRA closure activities that could conceivably also [have] been of use in the §3008(h) corrective action efforts, they have not been deducted [by Mead]."). It argues, however, that these costs were incurred solely for independent regulatory compliance purposes.

The record does not support Mead's assertion that the costs in question served only an independent regulatory purpose. Jay Vandeven provided the following assessment of these costs in his rebuttal expert report:

> This issue was raised in previous expert reports by myself and Dr. Ball, and addressed by the court. The costs questioned by Dr. Ball relate to the monitoring of water quality in wells installed to comply with Woodward Coke plant RCRA permit and NPDES-permitted outfalls.
>
> That these activities are associated, in part, with RCRA and NPDES compliance is not disputed; indeed, the amount of money Beazer is seeking to recover from Mead includes a discount for the costs associated with programmatic requirements. However, the remaining costs after the discount are indeed recoverable and have been incurred in a manner consistent with the NCP. The data generated by the monitoring of RCRA compliance groundwater monitoring wells and NPDES outfalls have been and will continue to be used in the RFI. For example, the RFI contains a number of potentiometric surface maps, which are used to understand groundwater flow patterns. Each of these maps were developed using

groundwater elevation data from the RCRA compliance wells.

The NPDES outfall in question monitors discharges from the South Pond, which is a regulated Solid Waste Management Unit (SWMU). As a SWMU, the South Ponds are a potential source for releases of chemicals to the environment. Monitoring of potential releases from this SWMU is an integral component of the RFI.

Therefore, it is clear from my review of the site documents that no costs are *"due solely to the operation of the Woodward Coke plant."* Rather, a portion of the costs were associated with activities that had multiple purposes. In addition, the activities in question continue to be required by ADEM even though the plant has ceased operation and has been demolished. Consequently, the costs associated with these activities cannot be due solely to the operations of the Woodward Coke plant.

Rebuttal Expert Report of Jay Vandeven (Document 319) at pp. 18-19. Mr. Vandeven's trial testimony further explained the manner and means by which the data and resulting knowledge gained from the activities underlying these costs were used as part of Beazer's response actions. For example, in conducting the groundwater quality assessment for the RFI, data taken from any particular location or well could not be separated from the data gathered from other monitoring locations. He explained:

From a technical perspective, you really can't separate, the data that you gather from [wells put in around one particular RCRA regulated unit] from the data that you gathered during the rest of the RFI.

> For instance, a big part of the RFI at the site is characterizing the nature of the groundwater flow. To do that, you take water level measurements in the wells and develop a map of how groundwater flows. Well, the water levels from those RCRA wells were used in developing the RFI groundwater maps. They are used for, at least, dual purposes.

TT of February 4, 2002 (Vandeven) at 162-63. Thus, Mead's general arguments concerning Beazer's NPDES and RCRA groundwater sampling are unavailing. Similarly, the data gathered for the "outfall area study" was used to identify the migration of Contaminants that originated in the South Pond, a RCRA management unit. The sampling attempted to identify and characterize contaminants generated from the historical waste disposal at the site that resulted from various tars and coking bi-products being released into the South Pond during the years it was used as part of the industrial process. Id. This activity was part of the AOC. Id. at 163. A similar investigation was undertaken in conjunction with the plant lake. Id. at 167. It too sought to monitor and characterize groundwater that was leaving the site and flowing into Opossum Creek, which is one of the primary receptors and points of concern identified by the EPA and ADEM. Both outfall area studies monitored the movement of constituents through the groundwater from onsite locations to remote and offsite locations. Id. at 167. Both sought to characterize releases from RCRA units on site, including historical disposal sites and solid waste management units. Id. at 168. And, all monitoring and characterization of groundwater and its flow through the karst terrain contributed to the formulation of the site conceptual model for groundwater flow. It follows that these costs are recoverable costs of response incurred consistent with the NCP.

Mead's contends that the monitoring and sampling activities associated with the actual closure of three RCRA regulated units reflect nonrecoverable response costs because the activity was not aimed at producing data useful to the formulation of the risk assessment. Although the investigation, characterization and monitoring activities associated with closing these units did not lead to data used in the risk assessment, these costs are nevertheless recoverable response costs.

First, two of the three RCRA regulated units that are now controlled by a part B RCRA permit were produced by onsite historical waste disposal practices that resulted in hazardous wastes being present on the site for a number of decades. TT of February 6, 2002 (Document 339) (Vandeven) at 47. The costs associated with the closure, remediation and post-closure monitoring of these units relate to onsite historical waste disposal practices, and two of the units were operated prior to Beazer purchasing the site from Mead. Id. at 53. The activities undertaken in conjunction with these units is thus directed at monitoring, controlling and remediating the release of hazardous substances generated by historical waste disposal practices.

Second, this court previously considered and rejected Mead's contention that the site should be segregated into distinct operable units, with responsibility being allocated based upon the parties' respective use or association with those units. Instead, the court held that consistent with traditional field and agency practice, the investigation, characterization and assessment of the site must be examined and analyzed as a whole. See Findings of Fact and Conclusions of Law of November 24, 1999 (Document 303), at 70-78, 95 ("Any allocation in this case must encompass the entire site, and must include investigation expenses that have

resulted in certain areas of the site being found not to need remediation.").

Third, the basic aims of an RFI under RCRA (and a remedial investigation under CERCLA as well) are to determine the nature and extent of contamination at the site, use all of the data available to conduct a risk assessment and examine and evaluate feasible remedial alternatives. Id. at 29. The various activities that Mead contends are "nonrecoverable RCRA regulated unit closure costs" segregated by Dr. Ball into the "C-1" category have contributed and will continue to contribute to the site-wide characterization of the contamination and its potential to migrate. Understanding the entire picture is essential to identifying and evaluating, feasible remedial alternatives. TT of February 6, 2002 (Document 339) (Vandeven) at 29, 33, 52 ("All sampling analysis at the site provides for characterization of the nature and extent of contamination as required by the AOC.") & 53. In addition, the closure, remediation and monitoring of the historical Waste disposal units already are part of the goal to be obtained by implementing the AOC, the actual remediation of the site. Accordingly, these costs- properly are included as recoverable response costs.[3]

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[3] The court agrees with Mead as to two particular costs placed in this category by Dr; Ball. It is well settled that RCRA does not in itself provide for the recovery of past costs incurred in the treatment, storage and disposal of hazardous wastes. See Meghrig v. KFC Western, Inc., 516 U.S. 479, 484 (1996). Consequently, recovery is appropriate under a RCRA-based program only where recovery of the claimed costs is warranted under CERCLA. Id. at 487-88. The $6,000.00 post-closure application fee paid to ADEM reflects a purely administrative RCRA cost and the cost itself lacks any potential to contribute to the characterization of the site or the evaluation of potential remedial measures. Thus, it will be

Mead's contention that its CERCLA liability was extinguished by Beazer's submission of a risk assessment to the environmental agencies on March 3, 1997, also is Unavailing. At the completion of Phase I and II of the RFI Beazer submitted a risk assessment to ADEM as an appendix to its report on those phases. The risk assessment was

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excluded.

In addition, Beazer agreed that a deduction is appropriate for the costs of installing and monitoring the wells for one of the post-closure units because one unit was created exclusively by Beazer's operations at the site. Beazer deducted $365,299.00 from its claimed costs as reflective of installing and monitoring four RCRA ground wells at a hypothetical RCRA regulated unit. This calculation was made based on the estimated costs which would have been required by the K060 regulated unit at the site. Testimony from Beazer's environmental project manager indicated that the unit had five wells associated with it, not four. Based On Beazer's average cost for each of the four wells, an additional deduction of $91,324.75 is appropriate.

The remaining costs placed in the "C-1" category by Dr. Ball are recoverable. Dr. Ball reviewed Beazer's invoices to determine whether on their face the invoices reflected activities that "were referenced in the risk assessment or were reasonably necessary to produce the risk assessment." TT of February 5, 2002 (Ball) at 94; see also id. at 95. If the invoice did not demonstrate its purpose in this process, Dr. Ball placed it in "C-1." Id. at 95. This approach is contrary to the substantial compliance standard mandated by the 1990 NCP. Furthermore, the court has reviewed the remaining invoices in this category and is satisfied that they reflect monitoring and data-gathering activities that are essential to characterizing and understanding the site as a whole in conjunction with assessing the nature of the release, understanding its potential risks and evaluating feasible remedial measures.

prepared by Beazer's contractor, Ogden, and provided in pertinent part:

> Estimated non-cancer risks resulting from potential exposures to site related constituents are all below the U.S. EPA's target Hazard Index of 1.0, for all receptors in all media at all exposure areas. Similarly all estimated excess lifetime cancer risks are within the U.S. EPA's target risk range of 1×10^{-6} (1 in 1,000,000) and 1×10^{-4} (1 in 10,000).

Defendant's Exhibit M-14 at p. ES-2. Mead notes that "the entire Ogden risk assessment is extremely conservative" and expressly indicates that conservative assumptions have been employed in developing it. Mead's Post-Trial Brief in Support Of Judgment (Document 341) at 21 (citing Defendant's Exhibit M-14 at p. 7-1). Mead further contends that the risk assessment has been accepted by ADEM because it has approved Beazer's report on the Phase I & II RFI activities and has not indicated any disagreement with the risk assessment.[4]

Based on the above, Mead argues that "the primary focus of CERCLA and the NCP is the elimination of unacceptable risk to human health and the environment" and because a determination of no unacceptable risk has been made through Beazer's risk assessment, no further action would be required under CERCLA. From Mead's perspective all activities at the site subsequent to the submission of the risk assessment

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[4] Mead bolsters this argument by asserting that "from the CERCLA perspective, Beazer is the 'lead agency'" and as a result a determination has been made that no further remedial action within the meaning of CERCLA will be necessary at the site.

were undertaken to comply with the regulatory requirements of RCRA and any costs Beazer incurred after that date "were 'on its own nickel' because the costs would no longer be necessary costs of response pursuant to CERCLA, since they no longer were incurred in response to a threat to human health or the environment." Id. at 21. Because the risk assessment purportedly established that no further action was required under CERCLA, Mead contends that all costs incurred after May 3, 1997, are not recoverable response costs.

Mead's contention that the risk assessment extinguished its liability under CERCLA is specious. First, while Beazer is "the lead agency" under various provisions of the NCP, the determination of whether further corrective measures and/or additional activities leading to remediation of the site will be required under the AOC is a determination that remains with the environmental agencies. No provision of the AOC explicitly or implicitly grants Beazer the authority to decide that its obligations to perform a corrective measure study and implement any remedies selected by the agencies have been extinguished by its assessment of the risk posed by the site.

Second, ADEM's letter of August 24, 2000 - indicating the draft Phase I & II RFI and groundwater assessment reports prepared by Beazer's contractor have been "approved" - cannot be read to support Mead's contention that the conclusions advanced in the risk assessment have been accepted by ADEM and therefore no further response actions or remedial measures under CERCLA will be necessary. See Defendant's Exhibit M-15. The letter merely indicates that the reports have been approved, which can only be understood to mean that Beazer has fulfilled the requirements of the work plan governing Phase I & II investigation activities and developed a risk assessment. See TT of February 6, 2002

(Vandeven) at 56. In other words, the letter simply means that Beazer met the requirements of Phase I and Phase II of the RIF work plan and has developed the risk assessment as required by the terms of the AOC. Id. And ADEM's intent to further investigate and characterize the potential migration of hazardous substances before substantively approving the risk assessment and moving to the corrective measures component of the AOC is evident by the reference in the letter to the "Phase III RFI work plan" under negotiation between ADEM and Beazer. It also is evident that the need for the Phase III work arose as a result of areas of concern generated from the submitted reports. Defendant's Exhibit M-15; TT of February 6, 2002 (Vandeven) at 55-56; TT of February 5, 2002 (Vandeven) at 7, 29-30.

Third, it is a well-accepted premise that the risk assessment is only one step in the CERCLA decision-making process. See Rebuttal Expert Report of October 2000 at pp. 13-14; TT of February 6, 2002 at 28-31. It is merely one piece of information that will be used by the environmental agencies along with all other available information in making their own assessment of the acceptable and unacceptable risks that remain at the site. Id.

The author of the Ogden risk assessment, Dr. Magee, also expressed the same view. In conjunction with questioning regarding Ogden's decisions to include or exclude particular chemicals in a risk assessment presented to an environmental agency, Dr. Magee provided the following insight as to how a risk assessment is prepared and presented:

> As is typical in the work that I do for clients, I view my job to put a realistic defensible risk assessment on the table first time through that's consistent with the law and the regulations and the guidance but that

wears the client's hat rather than the agency's hat because I'm working for the client.

We know full well that the agency may often, and usually does, disagree with many of the assumptions and approaches that we take. So that the numbers of this report, which is the favorable report to start the negotiation with the agency, concludes simply that nothing has to be done anywhere.

But I don't believe for a minute that nothing will have to be done anywhere. Because I believe that they're going to say, up in the ponds, you have shown that if a trespasser gets in there and touches some of the sediment, it won't hurt them. But you didn't say a darn thing about the ecology, the ecological receptors.

Or you assume that if trespassers get on the site and contact the average of all the soil across one or two areas, that there won't be a problem. But you didn't consider that they might go preferentially to this very small, what we would call, hot spot; what would be the answer if they went just there?

On groundwater, you assume no use of the groundwater directly beneath the site. While we might, all agree that it's unlikely that someone would drop a well there and make that their drinking water, they could use the water for industrial process water. Again, not atypical of any site, the negotiation that goes on between the PRP and the agency is just that, and we haven't seen how they responded to this yet.

So from my general experience on sites that have these kinds of chemicals in them at these levels, I am

> sure that some remediation will be required. And it will be my job then, if I'm asked to continue working on it, to focus it in and make it be reasonable and cost effective, selective removal in just this area, capping and so forth.

Deposition testimony of Dr. Magee at pp. 48-50. In other words, the initial risk assessment submitted by Beazer is anticipated to be a mere first step in the bargaining process between the EPA/ADEM and Beazer with regard to what additional response/remediation activities will be required at the site. Absent written notice from the EPA/ADEM indicating Beazer has complied with all of its obligations under the AOC, there is no factual or legal basis for this court to conclude that subsequent response and remediation activities at the site will fall outside the "necessary" and "consistency" requirements of CERCLA.

Furthermore, to extrapolate the proposition that no unacceptable risk remains at the site and therefore no further remedial measures will be required from the statements made in the risk assessment fails to acknowledge the role of the EPA in evaluating the information generated from agency-directed investigations. Ogden's risk assessment did not purport to render a conclusion on whether the site continues to present an acceptable or unacceptable risk. The assessment merely advances an objective proposition regarding general, site-wide estimated non-cancer and excess lifetime cancer risks. The assessment is based upon numerous assumptions about the hazardous substances present, the likely pathways of exposure, the likely receptors and future expected land and water use. It does not purport to address the need or lack thereof for future remedial action.

Guidance documents from the EPA indicate clearly that mere objective findings reflecting the presence of hazardous wastes within an acceptable target range does not mean that a CERCLA-quality remedial measure will not subsequently be required by the EPA at the site. In a memorandum providing guidance on the use of a risk assessment in the CERCLA decision-making process, the EPA has emphasized that a finding within the agency's acceptable target range will not eliminate the agency's discretion to require further remedial action based on other pertinent factors. EPA's Office of Solid Waste and Emergency Response advises that "the EPA uses the general 10(-4) to 10(-6) risk range as a 'target range' within which the Agency strives to manage risks as part of a Superfund clean-up," but further emphasizes:

> (a) A risk manager may also decide that a baseline risk level less than 10^{-4} is unacceptable due to-site specific-reasons and that remedial action is warranted [and similarly] EPA may determine that risks less than 1 x 10^{-4} are not sufficiently protective and warrant remedial action.
>
> (b) Other chemical-specific ARARS [applicable regulations and applicable requirements] may also be used to determine whether a site warrants remediation.
>
> (c) The upper boundary of the risk range is not a discreet line at 1 x 10^{-4} ....

Role of the Baseline Risk Assessment in the Superfund Remedy Selection Decisions, EPA Office of Solid Waste and Emergency Response (OSWER), 1991, Base 9355.3-30; see also Rebuttal Expert Report by Jay Vandeven at pp. 12-13; TT of February 6, 2002 (Vandeven) at 30-31.

The AOC incorporates the EPA's authority to evaluate as a whole all risks presented by the site. All of Beazer's work under the AOC is submitted for agency review. The EPA and ADEM retain the express right to require additional investigation, characterization; monitoring or remedial action whenever in the agencies' judgment the data submitted by Beazer requires such measures and the EPA reserves the right to select and require the implementation of corrective measures. See, e.g., AOC at pp. 7-8. The EPA and ADEM have not substantively approved the Ogden risk assessment or released Beazer from any further obligations under the AOC; to the contrary, they have required additional RFI work pertaining to deep and off-site groundwater flow. Under these circumstances Mead's contention that the Ogden risk assessment eliminated any further basis for cost recovery under CERCLA lacks sufficient evidentiary support and Beazer's post March 7, 1997, response costs are recoverable to the extent they are not otherwise precluded by the court's rulings.

Mead's assertion that Beazer engaged in inefficient and excessive sampling at the site, thereby rendering a substantial portion of the data collected "unnecessary" for the purposes of assessing risk and selecting a remedial action, also is without merit. Mead argues that in accordance with the NCP, "[t]he purpose of the remedial investigation ("RI") is to collect data necessary to characterize adequately the site for the purpose of developing and evaluating effective remedial alternatives." 42 C.F.R. §300.430(d). It then notes that a number of the samples collected during Phases I & II of the RFI were not used by Ogden in formulating the risk assessment. It reasons "that the risk assessment is the essential document for identifying and evaluating effective remedial alternatives and therefore "only those data necessary to support a risk assessment for the Woodward Coke Site are

recoverable under the NCP." Mead's Post-Trial Brief in Support of Judgment at p. 23.

Mead reduces its "unnecessary" sampling arguments to a set of mathematical formulas. The total number of samples made available to Ogden for formulating the risk assessment was 662. Ogden used a maximum number of 368 investigative samples in evaluating the mediums of concern (soil, groundwater, sediment and surface water) and thus from Mead's perspective a total of 294 samples were not used in calculating the risk. Mead's expert then tabulated the estimated cost of gathering the 662 samples and subtracted 44% from this total (i.e., 294/662 equals .44).

As a further refinement of this requested reduction Mead notes that while 368 samples represent the maximum number used by Ogden for an individual contaminant of concern, in certain of the medium of concern Ogden used far fewer samples to calculate the risk. For example, to calculate the risk for some contaminants of concern in the soil, Ogden needed only 34 samples and for others Ogden used the maximum number of samples available, 93. From these premises Mead reasons:

> Thus, although Ogden used the additional data, they were clearly not necessary to complete the risk assessment, as the minimum number was used for many of the [contaminants of concern]. In aggregate, the minimum number of samples used by Ogden is 166, as opposed to the maximum aggregate of 368.
>
> Therefore, as further refinement of the percentage listed above, the investigation and laboratory costs that are not recoverable under CERCLA and the NCP

> equal approximately 74% - (662 minus 167)/662 - of the total sampling related costs claimed by Beazer.
>
> The deduction from Beazer's costs that should be made if one looks solely at the data used in the risk assessment is $1,154,018.67 (44% of $2,622,769.71 - the "total E/F costs" ...; if the deduction is based upon the efficient data needs (that is the number of samples-which would have satisfied the risk assessment needs) the deduction is $1,964,976.07 .... Mead is willing to "split the difference" with Beazer between the deduction based upon the "inefficient" risk assessment number and the deduction based upon the efficient risk assessment number; thus, the deduction Mead proposes for this item is $1,559,497.37 ($1,964,978 + $1,154,018 = $3,118,994 ÷ 2).

Id. at 25-26. In other words, Mead advocates that only the minimum amount of data samples needed to formulate the risk assessment, as calculated after the fact, can be found to be necessary costs of response incurred consistent with the NCP.

Mead's mathematical efficiency arguments are flawed on many levels. First, the court already has considered and rejected Mead's contention that Beazer engaged in inefficient and/or ineffective methods of gathering and processing the information used in characterizing the site. In the previous phase of the litigation Mead argued that there was evidence of "over testing" by Beazer in that it did more testing under RCRA than would have been "necessary" under CERCLA, pointing to purported over sampling during Phase II of the RFI work plan as an example. See Findings of Fact and Conclusions of Law of November 24, 1999 at p. 52. Mead also challenged Beazer's methods of sampling as inefficient

and lacking quality control. Id. After considering these matters, the court rejected Mead's challenges on the grounds that there was nothing "suspect" in the manner in which Beazer proceeded with its sampling programs under Phase I & II of the RFI and Dr. Ball's criticisms merely reflected "the type of difference in professional opinion referred to by the USEPA in guidance documents, and which is to be expected from site to site." Id. at 53.

The court explained that identifying the most efficient approach to investigating a site under CERCLA was not grounds for excluding additional costs as unnecessary because such a rigid approach "leaves no room for the accepted notion that professional judgment might vary from site to site." Id. at 54, 74. It then made the following finding:

> 54. Dr. Ball's criticisms of the manner in which the site was addressed under RCRA do not suffice to establish that any of the actions taken are inconsistent with the national contingency plan. The manner in which a site is addressed under RCRA or CERCLA differs from site to site, and a certain amount of professional style (for lack of a better word) or judgment is inherent in the system. Dr. Ball has established only that he would have conducted the site inspection and remediation differently: he has not established that anything actually done at the site was inconsistent with the NCP.

Id. at p. 78, ¶54. Indeed, the court rejected the proposition that efficiency arguments based upon hindsight are a proper means of identifying necessary costs of response incurred consistent with the NCP. The court opined:

> 15. Recovery of costs pursuant to CERCLA requires that actions taken be "consistent with" the NCP. There is no requirement that the actions be no more than are necessary. There is no authority for viewing the consistency of actions taken in hindsight, i.e., by arguing that certain actions may not have been necessary. In short, there is no requirement that a remedial investigation [be] "perfect" before costs expended will be found to be consistent with the "NCP" and, therefore, recoverable in a CERCLA action.
>
> 16. Mead, through the testimony of Dr. Ball, seems to assert that any action which would not be forced upon a PRP under CERCLA would not be "consistent" with the NCP. The court disagrees. Again, the NCP vests discretion in individual professionals involved in the investigation and remediation of a particular site to select from a range of options. There is no support in the law for Dr. Ball's hypothesis, and the expert testimony offered by Beazer concerning the practices in the field is entirely to the contrary.

Id. at p. 98, ¶¶ 15, 16. Thus, the court already has ruled that the necessity and consistency requirements under CERCLA are not limited to the minimal means of investigating and characterizing the risk posed by a site as measured with hindsight.

Second, Mead's attempt to reduce the necessity and consistency requirements of CERCLA to encompass only those tasks undertaken to gather data directly used in formulating a risk assessment reflects a significant misapprehension of the CERCLA decision-making process and the information needed to perform that process efficiently

and effectively. The applicable regulation does indicate that "the purpose of the remedial investigation is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives." 42 C.F.R. §300.430(d). But, it does not follow from that proposition that only the gathering of the data actually used to support a risk assessment constitutes recoverable costs under the NCP.

The AOC obligated Beazer to collect data to characterize the site, delineate the nature and extent of the contamination present, and perform a baseline risk assessment. Beazer has gathered the data to characterize the site and published a draft Phase I & II RFI report. All of the data collected was used in formulating the RFI report, and the risk assessment was but one component part of that report. Rebuttal Expert Report of Jay Vandeven at p. 23. ADEM reviewed the report and mandated additional investigation above and beyond the data collected during the first two phases of the RFI investigation prior to requiring Beazer to undertake the process of completing a corrective measures study. Thus, the steps Beazer has been required to take in implementing the AOC demonstrate clearly that collecting the data necessary to evaluate remedial alternatives effectively encompasses far more than a "private party's formulation of a risk assessment.[5]

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[5] A review of the persuasive expert testimony of record more than adequately supports this proposition. As Jay Vandeven highlighted in his rebuttal expert report:

> Data collected during the course of an investigation have many purposes and uses. These data are used to develop conceptual models of the site, to delineate the nature and extent of contamination, to evaluate groundwater flow and

> contaminant transport, to document site conditions for evaluation of remedial alternatives, and to assess risk. The risk assessment, which is only one component of the RFI, does use all. the data available in a qualitative manner and a subset of the data in a quantitative manner to evaluate exposure pathways and calculate an excess lifetime cancer risk and hazard index. All of the information from the various phases of the RFI, including the risk assessment, when complete, will be considered by ADEM when they ultimately select a remedy at the site.

Rebuttal Expert Report of Jay Vandeven at p. 22. At trial he reiterated the multifaceted use of data in conducting an initial CERCLA or RCRA investigation, emphasizing that the basic objectives under both RCRA and CERCLA are to characterize the nature and extent of the contamination at the site and then to develop remedies to address the risk posed to human health and the environment. TT of February 6, 2002 (Vandeven) at 8.

Dr. Magee, the vice president and principal toxicologist of Ogden Environmental and chief architect of the risk assessment, similarly emphasized the multi-purposes for collecting data during the course of a CERCLA site investigation. He repeatedly emphasized that the entire data selection and evaluation process leading to the formulation of a risk assessment has a bearing on and informs the decision-making process concerning the assumptions underlying the risk assessment and the selection of the data used to formulate the assessment. Deposition Testimony of Dr. Magee (Document 331) at pp. 25-30. For example, all of the groundwater samples were entered into a database and initially considered before strategic decisions were made "about what to put in the first report to send off to the State and EPA." Thus, while all the groundwater-data was evaluated, only a few samples actually were quantitatively used from very specific locations as a result of a "strategic decision as to how to treat a very complex subject." Id. at 36-37.

work after the completion and submission of the risk assessment as well as its compilation of conceptual models such as the site conceptual model for groundwater flow further demonstrate the breadth of data and information needed by the environmental agencies to move toward the development of alternative remedial measures. The environmental agencies decision to conduct further groundwater testing and analysis before completing the RFI process demonstrates quite clearly that the selective process employed in formulating the risk assessment might prove to be too narrowly confined and the use of data not contained in the risk assessment might be required in the environmental agencies' subsequent evaluation and decision-making process. The use of this vast array of information in the decision-making process in itself demonstrates the inappropriateness of confining the CERCLA's cost recovery mechanisms to the minimal amount of data necessary to conduct a risk assessment is determined with the benefit of hindsight.

It follows that limiting the recovery of response costs to only the data used in a private party's formulation of a risk assessment thus would inappropriately eliminate the costs of some of the data actually used to assess and characterize a release or threaten release, formulate various assumptions employed in the risk assessment, and effectively evaluate feasible remedial alternatives. It likewise would create an improper motive for private parties to minimize the amount of data made available for an environmental agency's decision-making process from sources other than the risk assessment and/or incorporate extraneous data into the risk assessments.

Mead's contention that recoverable response costs should be limited to the actual and/or minimal amount of data needed to complete the risk assessment effectively was considered and resolved during the preceding phase of this litigation. Mead

has advanced no authority or reason for reexamining this aspect of the prior litigation. But even assuming arguendo that there is some ground for reexamining the prior findings and rulings, the record adequately demonstrates that the entire sampling undertaken to investigate and characterize the site constitutes a necessary cost of response incurred consistent with the NCP. Accordingly, Mead's mathematical efficiency arguments cannot be accepted by the Court.

The parties dispute whether Beazer is entitled to prejudgment interest on its recoverable response costs, and if so, when any such interest began to accrue. Beazer contends prejudgment interest properly is recoverable in a contribution proceeding and asserts it has met all statutory requirements governing a private party's entitlement to it. Mead contends that prejudgment interest is not available in a contribution action and even if it is, Beazer has not demonstrated entitlement to it.

A private party is entitled to prejudgment interest on recoverable response costs in a CERCLA contribution action. Mead's argument that only the government has the right to prejudgment interest is unpersuasive. The courts that have considered whether prejudgment interest is available in a private party contribution action have concluded that the contribution provisions of 42 U.S.C. §9613 (f) incorporate the prejudgment interest provisions of 42 U.S.C. §9607(a)(4), and thus prejudgment interest is available in a contribution action. See, e.g., Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc., 100 F.3d 792, 799 (10th Cir. 1996) ("We hold prejudgment interest should be granted in §113(f) actions in the same fashion as it is granted in §107 actions."); Boeing Co. v. Cascade Corp., 920 F. Supp. 1121, 1132, 1140 (D. Ore. 1996) (awarding prejudgment interest in §113(f) contribution action); Dow Chemical Co. v. Sinclair Oil Corp.,

3 F.Supp.2d 1252, 1254 (D.Wyo. 1998) (prejudgment interest recoverable in private party contribution action); Browning-Ferris Industries v. Ter Maat, No. 92 C 20259, 1996 WL 67216 at *4 - *5 (N.D.Ill. Feb. 16, 1996) (same).

In holding that prejudgment interest is available in a private party contribution action, the courts have reasoned that although a cost apportionment action must be brought pursuant to §9613(f), that section does not in itself create, independent rights for establishing liability. Instead, §9613(f) simply confirms a responsible person's rights under §9607 to obtain a proportional recovery from other potentially responsible persons. See Bancamerica, 100 F. 3d at 800. Thus, because CERCLA's contribution provision is only a mechanism for apportioning established CERCLA-defined costs, by necessity it incorporates the elements and measures of liability set forth in §9607. Id. (collecting cases). The United States Court of Appeals for the Third Circuit similarly has recognized that §113(f) of CERCLA incorporates the liability provisions of §107. See New Castle County, 111 F.3d at 1122 ("[S]ection 113 does not in itself create any new liabilities; rather, it confirms the right of a [PRP] under section 107 to obtain contribution from other [PRPs].").

And because the purpose of CERCLA's contribution provision is to apportion equitably §107 response costs among responsible parties, the courts generally have recognized that the failure to grant prejudgment interest on contribution awards would result in inequitable apportionment, i.e., the parties that paid more than their fair share in complying with government mandates would lose the time value of the money they spent on behalf of other responsible persons. Disallowing prejudgment interest under such circumstances would frustrate CERCLA's incentive for prompt, voluntary cleanup action by private parties under government oversight.

As the Bancamerica court recognized, "[i]ndeed, it would create a perverse incentive for responsible parties to delay involvement in cleanups, because as they delay, they gain the time value of funds they should be investing in the cleanup." Bancamerica, 100 F.3d at 801.

CERCLA provides that prejudgment interest begins to "accrue from the latter of (I) the date payment of a specified amount is demanded in writing or (ii) the date of the expenditure concerned " 42 U.S.C. §6907(a)(4). "The statute plainly requires a written demand for specified response costs as a prerequisite to an award of prejudgment interest." Matter of Bell Petroleum Services, Inc., 3 F.3d 889, 908 (5th Cir. 1993). To satisfy these requirements a party must make a written demand for payment of specific response costs that have been incurred. Notices that do not satisfy both requirements are insufficient. Id. see also The Dow Chemical Co. v. Sinclair Oil Corp., 3 F.Supp.2d 1252, 1253 (D.Wyo. 1998) ("Courts have fleshed out this seemingly clear statutory language by assuming (1) that both demand and expenditure are required (despite the disjunctive), and (2) that the demand must be made by the party seeking the interest.") (citations omitted)). For example, a notice from the EPA simply advising a potentially responsible party that it is considered to be responsible for response costs and/or informing the party of an unspecified demand for future reimbursement are insufficient. Id. In contrast, the filing of a complaint seeking the recovery of incurred response costs satisfies the statutory requirement even if it does not specify an exact amount. In Matter of Bell Petroleum Services, Inc., 3 F.3d at 908 ("Although the complaint does not specify an exact amount, we conclude that it constitutes a sufficient written demand for payment."); Bancamerica, 100 F.3d at 108 (complaint indicating party had incurred response costs "in excess of $1 million" and seeking reimbursement and interest triggered the

right to prejudgment, interest from the date the complaint was filed); Dow Chemical Co., 3 F.Supp.2d at 1254 (complaint along with simultaneously filed computation of damages indicating expenditures in excess of a specified amount constituted a sufficient written demand).

Beazer's letter of September 18, 1986, failed to satisfy the statutory requirements for prejudgment interest. The letter merely advised Mead of ongoing investigations by the EPA and ADEM, noted the possibility that corrective action might be required at specific locations within the site and invited Mead to participate in negotiations with the environmental agencies pursuant to an agreed upon method of sharing costs. The letter thus was not a written demand requesting payment for a specified amount of incurred response costs. Mead's follow-up letters fall short of the mark for the same reasons.

Beazer's amended complaint constituted the first demand that satisfied the statutory requirements for prejudgment interest. Beazer's June 14, 1991, amended complaint was in writing, demanded contribution for incurred response costs in excess of $180,000.00, and provided Mead with notice that Beazer would be seeking recovery for all future response costs incurred in cleaning up the site. See Amended Complaint (Document 15) at ¶¶ 32, 35. Accordingly, Beazer is entitled to prejudgment interest from June 14, 1991, forward with regard to the recoverable response costs incurred prior to that date and prejudgment interest from the date Beazer paid any subsequently incurred response costs.[6]

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[6] Mead's contention that the accrual of prejudgment interest should be tolled until Beazer served its cost documents on Mead pursuant to the case management order of April 5, 2000, is unconvincing. The amended complaint provided Mead with notice that Beazer was seeking contribution for recoverable costs of response that had been

Based on the above, the court calculates Beazer's response costs for activities through December 31, 1999, as follows:

Submitted Invoices:	$4,993,488.00
Less Resampling Costs	(55,984.76)
Less D-I Invoices	(35,041.09)
Less Post-Closure Application Fee	(6,000.00)
Less Additional Well Deduction	(91,324.75)
Total Costs	$4,805,137.60
Mead's Share @ 67.5%	$3,243,467.80

Accordingly, the court will enter judgment in Beazer's favor and against Mead in the amount of $3,243,467.80. The award will be subject to the addition of prejudgment interest as calculated in accordance with the court's rulings. Counsel for the parties will be directed to stipulate to the applicable prejudgment interest within a reasonable period of time.

An appropriate order will follow.[7]

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and would be incurred at the site. The statutory prerequisites were thus satisfied at that point and absent a prevailing defense an award of prejudgment interest as specified above is warranted under the circumstances.

[7] At the pretrial conferences in January and February of this year both parties indicated Beazer's obligations under the AOC would likely be ongoing for years. Mead indicated that any remedial measures may take decades to complete. Both counsel implied that this action would have to remain open in order to provide the parties with an appropriate forum for resolving any subsequent disputes.

/s/_____
Gustave Diamond
United States District Judge

From the court's perspective the destruction of the plant and the ongoing supervision of Beazer's implementation of the AOC by the environmental agencies indicate that any future response costs can be allocated in accordance with the comprehensive disposition of Mead's challenges set forth above. Accordingly, the court believes that the entry of a declaratory judgment on Mead's liability for Beazer's future response and remediation costs consistent with the court's findings and rulings to date would provide Beazer with appropriate and complete relief. Congress provided for declaratory relief under CERCLA to ensure that a responsible party's established liability would not have to be relitigated. CERCLA provides in pertinent part:

> In any such action ... the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover future response costs or damages.

42 U.S.C. §9613(g)(2). The mere possibility that future costs are somewhat speculative does not present a "bar to a present declaration of liability." Kelley v. E.I. du Pont De Nemours & Co., 17 F.3d 836, 844 (6th Cir. 1994) (quoting United States v. Fairchild Industries, Inc., 766 F.Supp. 405, 415 (D.Md. 1991)).

In light of the above, the parties will be directed to show cause why a declaration binding Mead to pay all incurred and future costs of implementing the AOC in accordance with the court's findings and rulings will not provide the parties with adequate relief under the circumstances.

cc: Mark D. Shepard, Esq.
D. Matthew Jamison III, Esq.
Melissa L. Evans, Esq.
Babst, Calland, Clements & Zomnir
Two Gateway Center, Eighth Floor
Pittsburgh, PA 15222

George P. Faines, Esq.
John H. Bingler Jr., Esq.
Thorp, Reed & Armstrong
One Oxford Centre, 14th Floor
Pittsburgh, PA 15219-2402

Alan M. Wiseman, Esq.
Thomas A. Isaacson, Esq.
Howrey & Simon
299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Van Carson, Esq.
Charles R. McElwee, II, Esq.
Squire, Sanders & Dempsey
127 Public Square
4900 Key Tower
Cleveland, OH 44114-1304

John E. Frey, Esq.
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive
30th Floor
Chicago, IL 60606-1225

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-408

[Filed March 7, 2000]

BEAZER EAST, INC., Plaintiff,	)
v.	)
THE MEAD CORPORATION, Defendant,	)
v.	)
KOPPERS INDUSTRIES, INC., Third-Party Defendant.	)

MEMORANDUM AND ORDER OF COURT

DIAMOND, D.J.

Beazer East, Inc. ("Beazer") commenced this action under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") seeking contribution for expenses that have been and will in the future be incurred in cleaning up the Woodward Coke Plant, an industrial site near Dolomite, Alabama. Coke used in the steelmaking industry has been produced at the site since 1911. Beazer seeks recovery against the Mead Corporation ("Mead") as a prior owner and operator of the site from 1911 to 1974. Mead asserted a counterclaim against Beazer as prior owner and operator of the site (1974 to 1988) and joined the current owner and operator of the site, Koppers Industries, Inc. ("KII"). Presently before the court are KII and Mead's objections to the Magistrate Judge's report of November 24, 1999, (Document No. 303), recommending equitable allocation percentages for each party. After de novo review of the record, together with the (1) proposed findings of fact and conclusions of law, (2) comprehensive allocation briefs, (3) recommendations for equitable allocation set forth in the report, and (4) objections to the report and responses thereto, the report and recommendation will be adapted by the court as modified herein, and further proceedings will be ordered accordingly.

Following the United States Court of Appeals for the Third Circuit's remand of December 9, 1994, this action was referred to the Magistrate Judge on December 22, 1994, for further proceedings consistent with the Third Circuit's opinion at Beazer East, Inc. v. Mead Corp., 34 F.3d 206 (3d Cir. 1994), cert. denied, 514 U.S. 1065 (1995). After the resolution of several pretrial matters, this court entered a

memorandum order on July 9, 1996, granting in part and denying in part Mead's motion for partial summary judgment. The order further provided:

> It further appearing that a determination of the equitable factors to be considered in the parties' claims for contribution [has] not yet been [made] and that a report and recommendation identifying such appropriate factors as well as setting forth a comprehensive allocation of Beazer's clean-up costs among the parties is appropriate at this juncture, IT IS ORDERED that a scheduling conference shall be held before the Magistrate Judge wherein timeframes shall be established for (1) proposing the equitable factors to be considered under §9613(f), (2) submitting briefs in support of an allocation of Beazer's clean-up costs among the parties, and, after a hearing if necessary, (3) the submission of a report addressing the same.

Memorandum Order of July 8, 1996 (Document No. 193). On August 29, 1996, the Magistrate Judge entered an order scheduling implementation of the July 8, 1996, directives.

On September 16, 1996, Mead filed an objection to the Magistrate Judge's order of August 29, 1996, contending that the scheduling order was inconsistent with the grant of authority set forth in the Magistrates Act, 28 U.S.C. §636, because the identification of the equitable factors might require the Magistrate Judge to make credibility assessments regarding the testimony of fact and expert witnesses and thus the hearing essentially constituted a trial of the parties dispute without Mead's assent. On April 30, 1997, this court overruled Mead's objection and denied Mead's supplemental motion to stay further proceedings on the grounds that the identification of the equitable factors was not a dispositive

undertaking in itself, particularly in light of the Magistrate Judge's requirement to issue a report and recommendation to which Mead could file timely objections. The court additionally noted that given the complex nature of the dispute, the court's ability to evaluate any specific objections to the report in a concrete context would conserve judicial resources.

The Magistrate Judge held a hearing on May 6, 1997, through May 21, 1997.[1] The parties introduced approximately 1300 exhibits contained in more than 47 ring binders and called 14 witnesses. On November 24, 1999, the Magistrate Judge issued a report recommending proposed findings of fact and conclusions of law. The parties filed their respective objections and responses thereto, with the final pleading being filed on December 28, 1999. The report and KII and Mead's objections were forwarded to this court for consideration on January 4, 2000.[2]

KII objects to the first recommendation made by the Magistrate Judge: "that KII be deemed a [responsible party], and that it be considered such as the court fashions the ultimate allocation in this matter." Report of November 24,

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[1] The heating consumed twelve days and has been transcribed in its entirety. See Document Nos. 276-77, 284 and 286-97.

[2] On December 18, 1997, the Magistrate Judge issued a report recommending that KII's motion for judgment on the pleadings be denied and this court entered a memorandum order that same day denying the motion. Also, the Magistrate Judge issued a memorandum and order on June 16, 1999, ruling on the parties' evidentiary objections made during the hearing. The parties do not contest the Magistrate Judge's June 16, 1999, memorandum and order.

1999 (Document No. 303) at p.4. KII objects for the reasons set forth in its motion for judgment on the pleadings as to Count I of Mead's amended third-party complaint and emphasizes that it should not be part of an equitable allocation in this litigation because Beazer is the party seeking an equitable allocation of its response costs against Mead, and thus the only relevant inquiry should be the percentage of Beazer's response costs to be allocated to Mead. This objection is misplaced for a number of reasons. First, as noted in the memorandum and order of September 8, 1995, granting defendant's motion for leave to serve a third-party complaint on KII, KII statutorily is a responsible person under 42 U.S.C. §9706 and the Third Circuit specifically noted that upon remand "the trial court will have to revisit the parties' contribution claims and correspondingly apportion liability for the attendant CERCLA response costs." Beazer East, 34 F.3d at 219 n.10 (emphasis added). Joinder of KII to Mead's counterclaim was proper under these Circumstances pursuant to Fed.R.Civ. P. 13(h) and 20 as well as for the reasons set forth in the Magistrate Judge's report of February 21, 1995. In addition, as a reading of the Magistrate Judge's November 24, 1999, report as a whole makes clear, a fair assessment of plaintiff and defendant's equitable shares of the response costs necessarily involves consideration of factors bearing on KII's current ownership and operation of the site and the value bestowed upon KII by the ultimate remediation, as well as other potential benefits which may inure to the site owner. These are factors which courts repeatedly have recognized as potentially relevant equitable factors in a 42 U.S.C. §9316(f) analysis. See, e.g., Hatco v. W.R. Grace & Co., 836 F.Supp. 1049, 1084 (D.N.J. 1993) ("the financial benefit derived from remediation is a factor that must be considered in determining the equitable contribution of each party to the remediation of the site"), vacated and remanded on other grounds, 59 F.3d 400 (3d Cir. 1995); Weyerhaeuser Co. v. Koppers Co., 771

F.Supp. 1420, 1427 (D.Md. 1991) (recognizing benefit remediation bestows on ultimate owner of environmentally safe property) (citing in support BCW Associates, Ltd. v. Occidental Chemical Corp., 1988 WL 102641 (E.D.Pa. Sept. 29, 1988)).[3]

KII's objection that an allocation of 2.5% to it is (1) inconsistent with CERCLA's underlying "polluter pays" policy and (2) not based on any volumetric or statistical analysis likewise is unavailing. Although the "polluter pays" policy is an important guide post in analyzing CERCLA matters, §9613(f) assigns to the court the obligation of determining in any particular case the appropriate equitable factors to be considered in the allocation process. The fact that the percentage assigned to KII is not based on principles which are typically employed in assessing the responsibility of parties who have contributed substantially to the environmental conditions requiring remediation does not restrict the court's identification and evaluation of the case-

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[3] These authorities likewise demonstrate the lack of merit in the first prong of KII's second objection, which challenges the conclusion that after remediation KII will "own property which is more valuable than it was pre-remediation." In the context of this case the conclusion is well supported by Mr. Graham's evaluation and testimony. The other prong of KII's second objection likewise is without merit. The Magistrate Judge merely recognized that KII would have an opportunity to recoup any costs imposed upon it through the further sales of coke (as a cost of doing business spread out over time). He also acknowledged, that the remediation would not permit KII to reap unanticipated profits due to the overall effects of environmental regulation/remediation on the domestic coke market. KII's prediction that it will be unable to recoup such costs through future sales does not eliminate its general opportunity to do so as recognized by the Magistrate Judge.

specific factors to be used in making a comprehensive equitable allocation among the parties. See Discussion of Court's Discretion, infra, at pp.8-9.

With one exception, Mead's objections also are unavailing. Mead's core objections are threefold: the Magistrate Judge erred (1) by failing to assign a greater percentage to Beazer based upon Beazer's pre-sale connection to and knowledge of the site and its willingness to bear the risks of various environmental costs in the future; (2) in assessing the weight to be given to the parties' expert/historical fact witnesses and discounting certain aspects, of Mead's evidence bearing on Beazer and Mead's contributions to the condition of the site and the attendant response/remediation costs of those contributions; and (3) in failing to assign responsibility for Beazer's history of noncooperation, delay and non-compliance with regulatory agencies and the potential dual purposes of some of the monitoring and corrective actions taken or to be taken at the site.

"Congress enacted CERCLA, a complex piece of legislation ... to force polluters to pay for costs associated with remedying their pollution." Beazer East, 34 F.3d at 219 (quoting United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992)). CERCLA is a remedial statute which is to be construed liberally to effectuate its goals and one of its principal concerns is assuring that those who are responsible for environmental conditions bear the costs of remedying those conditions. Id. (citing, Inter alia, B.F. Goodrich v. Murtha, 958 F.2d 1192, 1197 (2nd Cir. 1992)). Generally, CERCLA initially imposes strict liability on potentialiy responsible parties. The liability is joint and several with regard to response or remediation costs incurred by the United States or innocent third parties. New Castle

County v. Halliburton NUS Corp., 111 F.3d 1116, 1120-21 (3d Cir. 1997). With limited exception, a potentially responsible party who has incurred costs associated with hazardous waste clean-up and site remediation may recoup that portion of its expenditures which exceed its fair share of the overall liability through the contribution and equitable apportion mechanism engrafted into CERCLA by the Superfund Amendments and Re-authorization Act, 42 U.S.C. §9613(f).

Section 9613(f) provides that any person may seek "contribution from any other person who is liable or potentially liable under section 9607(a) of this title ...." 42 U.S.C. §9613(f) (1). The Third Circuit has held that the term "contribution" as used in §9613 (f) refers to a claim "by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. " In re Matter of Reading Co., 115 F.3d 1111, 1120 (3d Cir. 1997) (quoting Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994)). A primary consideration in allocating such costs is the concept of relative fault. Environmental Transportation Systems, Inc. v. ENSCO, Inc., 969 F.2d 503, 508-09 (7th Cir. 1992) ("courts should equitably allocate casts of clean-up according to the relative culpability of the parties rather than an automatic equal shares rule"); United States v. Monsanto Co., 858 F.2d 160, 173 n.29 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989) ("the language of CERCLA's new contribution provisions reveals Congress' concern that the relative culpability of each responsible party be considered in determining the proportionate share of costs each must bear").

Section 9613(f) provides that "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C.

§9613 (f); Halliburton NUS Corp., 111 F.3d at 1121; Gould, Inc. v. A&M Battery & Tire Service, 987 F.Supp. 353, 367 (M.D.Pa. 1997). Factors which appropriately are considered include the relative fault of the parties, whether the parties have contractually allocated responsibility for the cleanup costs, and the "Gore factors." Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 326 (7th Cir. 1994); United States v. Colorado & Eastern Railroad Co., 50 F.3d 1530, 1536 n.5 (10th Cir. 1995).[4] In any given case "a court may consider several factors, a few factors, or only one-determining factor, ... depending on the totality of the circumstances presented to the court." Colorado & Eastern, 50 F.3d at 1536 (quoting Environmental Transportation Systems, Inc. v. ENSCO, Inc., 969 F.2d 503, 509 (7th Cir. 1992)); AL Tech Specialty Steel Corp. v. Allegheny International Credit Corp., 104 F.3d 601, 608 (3d Cir. 1997) (it is within the court's discretion to rely on a single factor).

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[4] 4. The "Gore factors" are a non-exclusive list of relevant factors proposed by then Senator Albert Gore:

> (i) The ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
> (ii) The amount of the hazardous waste involved;
> (iii) The degree of toxicity of the hazardous waste;
> (iv) The degree of involvement by the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste;
> (v) The degree of care exercised by the parties, taking into account the characteristics of the hazardous waste; and
> (vi) The degree of cooperation by the parties with the federal, state, or local officials to prevent any harm to the public health or the environment.

The parties devoted considerable effort and resources in thoroughly developing the record on their respective positions regarding the factors which should command this court's attention and the Magistrate Judge's November 24, 1999, report identifies the appropriate equitable factors to be considered in this case. Mead contends that although the Magistrate Judge correctly found or concluded that

> "Reasonable parties negotiating the sale of an industrial site in Alabama in 1974 would expect that the seller would not be held liable for any future environmental costs" (Finding of Fact 65);
>
> "Beazer performed a full inspection of the Woodward Plant prior to its purchase, and was well aware of the environmental condition of the site" (Finding of Fact 68);
>
> "The parties in fact intended that Mead be able to 'walk away' from the site, i.e. that Mead would not indemnify Beazer for any future costs at the site for any reason, including environmental response costs" (Finding of Fact 66);
>
> "Beazer was in at least as good a position as was Mead, and was probably in a more informed position to assess the potential environmental problems at the site at the time of the 1974 sale" (Finding of Fact 67);
>
> "Beazer purchased the property from Mead pursuant to the doctrine of caveat emptor and with full knowledge of the contamination, or potential contamination, on site" (Conclusion of Law 27);
>
> "Beazer purchased the property 'as is' and with knowledge that the property had been contaminated by its

> decades of use as a coking facility. Beazer also had intimate knowledge of the site in terms of the manner and extent of the contamination on site" (Conclusion of Law 28); and
>
> "Mead is entitled to a reduction in its 'polluter pays' allocation due to its reasonable expectation, and Beazer's intent, to accept responsibility for all environmental regulation at the site 'post-sale'" (Conclusion of Law 29);

the Magistrate Judge failed to give proper weight to the intent of the parties and seriously understated the significance of these (and related) factors when he assigned only 15% to them in the allocation process. Mead further argues:

> [i]n effect, the Magistrate Judge assigned 12.5% of the liability to post-sale factors (10% to Beazer and 2.5% to KII) and 87.5% to pre-sale factors. In allocating the pre-sale liability, he assigned more than 70% to Mead because of its contamination but only 15% to Beazer for its agreement to bear the costs associated with its obligation to remediate that same pre-sale contamination. Given Mead's historic role more than four times the weight assigned to Beazer's agreement to bear the costs of those historic practices is neither equitable nor just.
>
> A large, highly sophisticated purchaser such as Beazer must bear the consequences of its decision to assume these liabilities. Yet, the Magistrate Judge virtually absolved Beazer of its considered decision to assume these costs. In a free market economy, the parties to arms-length corporate transactions must accept both the rewards and the risks of their

> decisions. CERCLA did not alter that fundamental premise.

Mead's Objections (Document No. 305) at p. 8. Mead asserts that a higher percentage is appropriate here, particularly where Beazer's pre-sale involvement with and knowledge of the site and the various contract-related factors are being considered as a single, overlapping factor in order to avoid Possible "double counting." See Conclusion of Law 31.

The court agrees that 15% understates the various factors which are combined in Conclusion of Law 31. Accordingly, the court will exercise its discretion and increase the percentage to 20%. In addition, because Beazer did not assert a claim for contribution against KII and the court finds that 2.5% appropriately represents KII's proportional share solely as to Mead's equitable allocation, the court will amend Conclusion of Law 33 to provide:

> The final equitable allocation amounts in this case are: Mead (90% of the waste, minus 2.5% for KII's share and minus 20% shifted to Beazer due to all circumstances surrounding the 1974 sale) - 67.5%; Beazer - 32.5%.

As modified the above allocation strikes an appropriate equitable balance between the factors surrounding the 1974 sale of the site to Beazer, Beazer and KII's ownership and ongoing operation of the site since 1974, the factors pertaining to each party's contributions to the current condition of the site, and the remaining equitable factors, identified in the report. Mead's general contention that these factors warrant an even greater percentage being assigned to Beazer is unpersuasive for the reasons noted in the report and addressed below.

Mead's specific contention that the Magistrate Judge misread the import of Beazer East is without merit. The Third Circuit examined the various provisions of the asset purchase agreement, determined that it contained contradictory provisions and recognized that although the parties did contemplate a division of specific environmental obligations, they did not legally effectuate a transfer of the stringent obligations and requirements which CERCLA ultimately imposed on Beazer. The court's refusal to construe the agreement as effectuating an indemnity agreement governing "CERCLA response costs leaves both Beazer and Mead responsible for their fair share of the clean-up costs associated with the coke plant," a result which reinforces CERCLA policy. Beazer East, 34 F.3d at 219. Against this backdrop the Magistrate Judge aptly observed that the context of the appeal did not foreclose Mead's ability to establish (1) the parties' factual intent to create a sweeping transfer of environmental liability and (2) the impact any such failed attempt should have on the matter at hand. Report at pp. 6-11. The various contractual provisions of the asset purchase agreement and the attendant circumstances surrounding the sale of the Woodward Coke plant have been carefully considered from an equitable perspective and, after placing those factors within the context of CERCLA's primary policy and fundamental principles, the court finds that 20% is the appropriate weight to be assigned to them. Furthermore, Alcan-Toyo America v. Northern Illinois Gas, 881 F.Supp. 342 (N.D.Ill. 1995), does provide persuasive support for assigning this weight to the factors of caveat emptor, Beazer's purchase of the property "as is" and with full knowledge of its condition, and Beazer's intent to accept responsibility at the site for environmental regulation, because Alcan-Toyo emphasizes the importance of similar factors where a sophisticated purchaser acquired environmentally contaminated property prior to the enactment of CERCLA and

a significant portion of the contamination had been placed on the site by the previous owner. In the instant action an even higher percentage has been assigned to Beazer in arriving at a fair and equitable assessment of the similar factors. Under all of the circumstances Mead's contention that the contractual/condition of-the-site factors should warrant an even greater percentage of the total allocation is unavailing.

Mead's attempt to rehash all of the arguments advanced as to why its witnesses' testimony and proposed assessments should be elevated over Beazer's is misplaced. The substantive strengths and weaknesses of the witnesses' testimony/opinions are thoroughly examined and explained in the report, and while Mead's reasons to disagree with the evaluations are apparent, the record does not warrant the substantial shift in emphasis advocated by Mead.[5]

Mead's numerous objections contending that the Magistrate Judge erred in evaluating whether in general

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[5] The review and assessment of the testimony in this manner and the expressed merit-based reasons for adopting certain portions of the witnesses' testimony and opinions also renders moot Mead' s objection that the allocation hearing/report and recommendation transcends the boundaries of the Magistrates Act. It similarly reveals the lack of merit in Mead's insistence that a trial de novo with live witness presentations be conducted before this court on the same issues presented to the Magistrate Judge in order for the court to judge for itself the credibility of witnesses. The report assigns relative weight on such factors as the methodology employed, the thoroughness of the expert's analysis, the number of potential relevant factors considered, the internal consistency of the testimony and assessments made, and so forth. It does not discredit any testimony on the basis of the demeanor or character of the witness.

various investigation costs and actions to be taken at the site under the Resource, Conservation and Recovery Act ("RCRA") constitute recoverable costs under CERCLA are curious. It was Mead's expert, Dr. Ball, who squarely raised the issue of whether various investigation costs, monitoring activities and projected remediation costs should be considered as an equitable allocation factor to Beazer's detriment. Mead's contentions in this regard were thoroughly developed by Dr. Ball in both his testimony and expert report. Beazer presented substantial expert testimony through (A) Dr. Harris and Mr. Vandeven of ENVIRON Corporation and (B) Dr. Jones to counter Dr. Ball's opinions and assessments, much of which pertained to whether the corrective actions being undertaken pursuant to the current RCRA action program are substantially similar to the investigation and remediation guidelines of CERCLA and the hypothetical program that would have been developed thereunder. These experts also referenced memoranda by the EPA expressing that agency's view that acceptable investigation/remedial action under the RCRA should be presumed to be acceptable and meet the standards of CERCLA and vice versa. Dr. Ball's methodology also raised the issue of whether an assessment of recoverable costs should be influenced substantially by his proposed on-site operable units (as opposed to addressing the costs for the entire site). The evidence of record demonstrated that while Dr. Ball's proposal was one way of assessing the need for and conducting the incremental steps toward obtaining regulatory compliance, the record in its entirety fell far short of demonstrating that the method pursued by Beazer (prior to and later at the insistence of the EPA) involved undertakings which were wasteful, duplicative or otherwise beyond the realm of actions necessary to respond to the threatened release of hazardous wastes and consistent with the National Contingency Plan. Mead's evidence failed to warrant a finding that Beazer's costs in general were not recoverable in

a CERCLA contribution proceeding. The Magistrate Judge correctly observed that recoverable costs are not limited to those believed to be the least necessary in the range of acceptable professional judgments regarding investigation and remediation action. The record has been developed thoroughly with regard to these general contentions and proposed findings of fact 51 through 55 (pertaining to the shortcomings of Dr. Ball's testimony and opinions) are well supported. To the extent these matters may preclude Mead from objecting to specific costs yet to be identified, any such consequences are a natural outcome of the issues Mead chose to raise.

Finally, the Magistrate Judge did not ignore or fail to consider Mead's contention that Beazer engaged in a course of non-cooperation and non-compliance which contributed to the costs sought to be allocated among the parties. The testimony and opinions of Dr. Harris and Mr. Vanderview of ENVIRON Corporation and Dr. Jones clearly established that Beazer did not create the need for additional action by its chosen course of investigation. Their testimony also made clear that given the nature of site and the substances created in the coking process, the twenty-three solid waste management units identified in the EPA's RCRA Facility Assessment of May 1988 and the three regulated hazardous waste units would have required the same investigation/remediation actions in any event. The Magistrate Judge considered similar contentions in assessing Dr. Ball's opinions and conclusions. It readily is apparent that the record did not support the proposition that any such alleged conduct increased the overall costs at issue. Mead's objections on these various points suffer from similar shortcomings in that they fail to demonstrate that the referenced factors had any impact which should factor into the equitable apportionment analysis at hand. In addition, even assuming that some undertakings may coincidently serve a dual purpose for

Beazer, this factor in itself does not make such undertakings unnecessary for proper monitoring and remediation of the site.

The parties agree that Beazer and the EPA are parties to a 1991 administrative order on consent issued under the RCRA and that an investigation of the site has been undertaken by Beazer in accordance with that administrative order. See Joint Stipulations (Document No. 270) at ¶47). Various investigations and monitoring reports also have been completed and submitted to the EPA and its state counterpart. Id. at 51 & 52. The parties further agree:

> Some of the costs which Beazer has incurred to date pursuant to the RCRA order at Woodward Coke are recoverable response costs which are necessary and incurred consistent with the National Contingency Plan.

Id. at 55. In light of this stipulation, the parties elected to present their materials on a comprehensive allocation formula and did not seek to have the Magistrite Judge determine whether any specific costs incurred to date by Beazor are recoverable, reserving the question of the recoverability of specific costs until a later phase of the allocation proceeding. See Report at p.17, n.6 (citing Transcript of May 13,1997 (Document 292) at pp. 24-25). Mead's general contention that substantial portions of the undertakings aimed at complying with the RCRA and the 1991 administrative order on consent are not recoverable costs under CERCLA has been resolved sufficiently in the report's assessment of Dr. Ball's opinions and recommendations. Beyond this general dispute the parties have not indicated in the record their remaining disputes, if any, regarding the recoverability of any specific costs incurred or to be incurred in cleaning up the site.

Accordingly, the court will schedule a status conference to ascertain the appropriate procedure for resolving this remaining aspect of the litigation.

For the reasons set forth above, KII's objections will be overruled and Mead's objections will be granted in part and denied in part. The Magistrate Judge's report and recommendation of November 24, 1999, as modified herein will be adopted as the findings of fact and conclusions of law of the court. In light of the above, the following, order is appropriate.

ORDER

AND NOW, this 7th day of March, 2000, for the reasons set forth in the above memorandum, IT IS ORDERED that Koppers Industries, Inc.'s objections to the report and recommendation of November 24, 1999, be, and the same hereby are, overruled and the Mead Corporation's objections be, and the same hereby are, granted in part and denied in part as reflected in the memorandum. The report as modified in the memorandum is adopted as the findings of fact and conclusions of law of the court. The final costs found recoverable in this action shall be allocated as follows: The Mead Corporation - 67.5%; and Beazer East, Inc. - 32.5%.

IT FURTHER IS ORDERED that a status conference be, and the same hereby is, scheduled before this member, of the court for Tuesday, March 21, 2000, at 10:30 a.m., in Courtroom No. 2, Eighth Floor, United States Post Office and Courthouse, Pittsburgh, Pennsylvania. Trial counsel must be present. The parties shall be prepared to report to the court in detail on the settlement posture of the case. Counsel shall have their clients present at the conference or immediately available for consultation. In the event the parties are unable to resolve

the remaining aspects of this litigation, the parties shall be prepared to discuss the most efficient procedures for identifying and resolving their remaining disagreements.

/s/_____
Gustave Diamond
United States District Judge

cc: Honorable Kenneth J. Benson
Chief, U.S. Magistrate Judge

Robert A. King, Esq.
Kenneth R. Bruce, Esq.
Albert Bates, Jr., IV, Esq.
Timothy C. Wolfson, Esq.
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Eighth Floor Pittsburgh, PA 15222

John J. Bingler, Jr., Esq.
George P. Faines, Esq.
Thorp, Reed & Armstrong
One Riverfront Center
Pittsburgh, PA 15222

Alan M. Wiseman, Esq.
Thomas A. Isaacson, Esq.
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Van Carson, Esq.
Charles R. McElwee, II, Esq.
Squire, Sanders & Dempsey
127 Public Square
4900 Society Center
Cleveland, OH 44114-1304

John E. Frey, Esq.
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive, 30th Floor
Chicago, IL 60606-1225

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 91-408

[Dated November 24, 1999]

BEAZER EAST, INC. ,	)
Plaintiff,	)
	)
v.	)
	)
THE MEAD CORPORATION,	)
Defendant,	)
	)
v.	)
	)
KOPPERS INDUSTRIES, INC.,	)
Third-Party Defendant,	)
	)

JUDGE GUSTAVE DIAMOND
MAGISTRATE JUDGE BENSON

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Procedural History.

This is an action commenced by Beazer East, Incorporated, (Beazer) seeking contribution from The Mead Corporation (Mead), for present and future expenses that have been and will be incurred in the clean-up of an industrial site near Dolomite, Alabama, referred to as the "Woodward Coke Plant". The sole claim remaining from the initial complaint is a claim for contribution under to the Comprehensive Environmental Response, Compensation and Liability Act, as amended (CERCLA), 42 U.S.C. §9607. There is also a third-party claim for contribution which is asserted by Mead against the present owner of the Woodward Coke Plant, Koppers Industries, Inc. (KII).

The procedural history of this case is long and tortured, and need not be recounted in full here, except for more recent events. The court has determined that Mead is a potentially responsible party (PRP) under CERCLA, and, hence, liability has been established pursuant to that statute. Beazer is also a PRP, having owned and operated the site from 1974 through 1988, and having already expended funds for investigation and remediation at the site. Finally, there is no dispute that KII, as the present owner and operator of the facility, and of about half of the land in question, is also a PRP. 42 U.S.C. §9607(a). There is, however, dispute concerning whether KII should be assigned a separate allocable share of clean-up costs. This question will be addressed preliminary to proceeding with the proposed findings of fact and conclusions of law drawn from the hearing in this matter.

A. Is Koppers a party to this allocation?

Beazer maintains that the sole question to be answered in this proceeding concerns Mead's allocable share. This is so, in Beazer's view, since Beazer may only seek through this contribution action to have Mead found responsible for Mead's equitable share of the response costs. *See, Pinal Creek Group v. Newmont Min. Corp.*, 118 F.3d 1298 (9th Cir. 1997), *cert. denied* 118 S.Ct. 2340 (1998) (contribution liability limited to a potentially responsible party's (PRP) equitable share). Beazer also points to an agreement it has with KII pursuant to which Beazer is responsible for all costs incurred by KII with respect to environmental liabilities at the site. (Indeed, Beazer and KII have been represented jointly in this proceeding.) Thus, in Beazer's view, this is truly a two-party proceeding, since whatever percentage of the response costs is attributed to Mead, the remaining costs will be borne by Beazer in any event.

Mead responds that any agreement between KII and Beazer is not properly before the court. What is at issue, in Mead's view, is the responsibility of all PRPs for the response costs in this matter. Thus, since KII is a PRP, its responsibility for contribution should be litigated in this proceeding, and, indeed, must be litigated in order to properly determine the allocable shares of Beazer and Mead.

A PRP may seek contribution from another PRP pursuant to §9613(f). A PRP may make a claim for contribution for either costs already incurred, or for costs to be incurred in the future. In fact, Beazer seeks contribution for both expenses already incurred, and for future expenses. Here, Mead has made a claim for contribution under §9613(f) against KII. Mead, as a PRP, is entitled to make such a claim, regardless

of the fact that it has not, to date, incurred any response costs.[1]

This court has already held, in ruling upon the motion to dismiss Mead's third party complaint, that consideration of the allocable share of all PRPs, including KII, is necessary. It is not persuaded by Beazer's argument that this conclusion should change.

While it is true that an agreement exists between Beazer and KII, this will result only in KII's share of the response costs, whatever that is found to be (and it is at least possible that the share may be 0%), being ultimately paid by Beazer. In any event, the court cannot properly pass upon Mead's allocable share without considering the responsibility of all PRPs for the contamination at the Woodward Plant. Thus, the first recommendation offered to the court is that KII be deemed a PRP, and that it be considered such as the court fashions the ultimate allocation in this matter.

B. The court's obligations.

This writer's responsibilities with respect to the next step to be taken in this matter were explained by Judge Diamond in his order of July 8, 1996:

> It further appearing that a determination of the equitable factors to be considered in the parties' claims for contribution have not yet been determined and that a report and recommendation identifying such

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[1] That Mead will be assessed some portion of the response costs is a foregone conclusion. The parties here merely dispute the extent of Mead's contribution.

> appropriate factors as well as setting forth a comprehensive allocation of Beazer's clean-up costs among the parties is appropriate at this juncture, IT IS ORDERED that a scheduling conference shall be held before the magistrate judge wherein time frames shall be established for (1) proposing the equitable factors to be considered under §9613(f), (2) submitting briefs in support of an allocation of Beazer's clean-up costs among the parties and, after a hearing if necessary, (3) the submission of a report addressing same.

(Docket #193 at 3). A scheduling order was entered on August 29, 1996 (Docket #201). Proposed equitable allocation factors were filed by the parties (Docket #s 202, 203, 204). Comprehensive allocation briefs, with appendices, were also filed by the parties (Docket #s 227-229 and 231-235), as were supplemental, reply and surreply allocation briefs and appendices (Docket #s 236, 237, 238, 239 and 240). The parties then submitted proposed findings of fact and conclusions of law (Docket #s 247, 260). Expert reports and rebuttal expert reports were filed at various times (Docket #s 207, 208, 216, 218, 219, 224).

A hearing was held in this matter over a period of twelve days, beginning on May 6, 1997, and ending on May 21, 1997 (Docket #272). During that hearing, the parties introduced more than forty-seven ring binders of exhibits, as well as numerous demonstrative exhibits, along with the testimony of fourteen witnesses. Although some of the exhibits were admitted into evidence, rulings on others were withheld pending the submission of final exhibit lists by each party and any objections thereto.

On June 12, 1997, Beazer and KII filed a joint, final exhibit list (Docket #274), referencing 748 separate exhibits.

Of these, 700 were offered into evidence. Mead filed objections to the admission of all or portions of 133 of the exhibits offered by Beazer and KII (Docket #278). Mead also provided a final exhibit list which sought admission of 493 separate exhibits (Docket #279). Beazer and KII objected to the admission of all or part of 5 of these exhibits. Both parties' objections to the other's exhibit list were filed on June 27, 1997.[2] Many of the exhibits offered by Mead, and two of those offered byBeazer and KII, were admitted into evidence during the hearing (Docket #272). Rulings on the admissibility of the 138 exhibits (or portions thereof) to which objections were raised post-hearing were made in an order filed on July 21, 1997 (Docket #282).

The parties also filed designations and cross-designations from numerous depositions, which fill six additional ring binders. Objections to the designations and cross-designations of each party were filed on June 5 and 12, 1997 (Docket #s 273 and 275). These objections often proceeded line-by-line through the deposition excerpts. Mead's objections are more than 50 pages in length, and Beazer's a relatively svelte 19 pages. Again, rulings on the objections to the specific designations were made and entered in the record on June 15, 1999 (Docket #302). Thus, after great pains, the record has been finalized.

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[2] The undersigned represented to the parties that a report and recommendation would be forthcoming by June 30, 1997. Obviously, having received the final submissions of the parties on June 27, 1997, and with a multitude of evidentiary rulings to be made, the projected dated became somewhat unrealistic. The delay in making these rulings has, for other reasons which are the court's responsibility alone, stretched on far beyond what it ought. For this the court offers its apologies.

C. The Third Circuit's Opinion.

The court is not writing upon a clean slate in this case. Hence, prior to setting forth proposed findings of fact and conclusions of law, it will first be necessary to review the opinion accompanying the order of remand in this matter.

This matter was remanded from the Court of Appeals, which reversed this court's entry of summary judgment in favor of Mead. Summary judgment was granted on the basis of the indemnification provision contained in the 1974 Asset Purchase Agreement (APA) between Mead and Beazer. The parties now contest, and the court must decide, what impact the appellate court's ruling has upon the allocation proceeding.

Beazer takes the position that the opinion of the Court of Appeals prevents consideration of the APA's indemnification provision as a factor in equitable allocation. Mead, on the other hand, asserts that the Court of Appeals' decision was addressed to the narrower issue of whether the indemnification provision in the agreement was legally sufficient to transfer liability. Mead argues further that the present inquiry is whether the parties *intended* to transfer such liabilities, a question not addressed by the Court of Appeals, not whether they *actually succeeded in so doing* under Alabama law, the question which was answered by the court. Mead asserts that the record establishes the parties' intention to have a legally enforceable indemnification agreement, and that this should be considered by the court in making an equitable allocation between the parties.

Having thus framed the issue before the court, a careful reading of the opinion of the Court of Appeals is in order.

Early in its opinion, the Court of Appeals framed the issue before it as follows:

> Thus, Beazer could have lawfully agreed to indemnify Mead for its CERCLA liability or, conversely, Mead could have lawfully agreed to indemnify Beazer. The issue is whether either did so.

34 F.3d at 211. As framed by the Court of Appeals, then, the issue on appeal was whether either party "lawfully" agreed to indemnify the other. After determining that Alabama law should apply to the construction and effect of the contract provisions, the court refined its statement of the issue as follows:

> We conclude that Alabama law requires a plain and unambiguous expression of intent to cover the cost of the liability in question. Using this standard, we now consider whether Paragraph 4(c) unambiguously expresses Beazer's intent to indemnify Mead against CERCLA liability.

34 F.3d at 217. The court went on to hold that the language in question was subject to more than one reasonable interpretation, i.e., it could mean that the parties intended indemnification for all liabilities, including CERCLA, or it could mean that the parties intended to encompass a lesser range of liabilities, not including CERCLA liability. The court concluded: "Under applicable principles of Alabama law, the parties failed to express the intent to indemnify with the requisite clarity. We hold, therefore, that Paragraph 4(c) is not specific enough to impose on Beazer a duty to indemnify Mead for their CERCLA response costs." 34 F.3d at 218.

Accordingly, the Court of Appeals did not rule, as Beazer would have it, that no indemnity was intended by the parties. The Court of Appeals held instead that the expression of the parties' intent contained in the contract was not possessed of "the requisite clarity" to permit a conclusion concerning that intent as a matter of law.

Viewed in this fashion, there is no inherent inconsistency in the ruling made on appeal and a decision by this court that, as a matter of equity, the parties' intentions concerning indemnity, to the extent they can be divined from both the document and any other evidence offered by the parties, should be considered in equitable allocation. If, as Mead argues, parol evidence plainly establishes that the parties intended a sweeping indemnity provision, a decision by this court to consider this fact in equitable allocation would not be inconsistent with the ruling made by the Court of Appeals. This is so since the Court of Appeals was not faced with this question and, hence, did not rule upon it. The question the appellate court decided was a legal one addressed to the sufficiency of the contract language, under applicable state law, to transfer all environmental liability for the site. Here, the court is faced with making a factual determination concerning the parties' actual intent. It will then be the court's duty to determine what effect, if any, the parties' intent should have upon the equitable allocation of response costs between the parties.

Other courts have drawn similar distinctions between the legal sufficiency of an indemnity provision, and the consideration of the intent of the parties in an equitable allocation of response costs. In *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321 (7th Cir. 1994), the Court of Appeals for the Seventh Circuit found that a contractual indemnity agreement, entered into in 1972 before

the passage of CERCLA, was sufficient to shift the responsibility for CERCLA response costs. In this respect, the Seventh Circuit reversed the lower court's finding. Prior to reaching this question, however, the appellate court found error in the district court failing to consider the indemnity agreement in the context of allocation, even though it had concluded that the indemnity agreement was insufficient to shift responsibility for CERCLA response costs.

> Since the district court did not believe the indemnification agreement applied to the cleanup costs at issue, the court ignored the agreement when allocating responsibility for cleanup costs. This was an error. Although contractual arrangements between parties are not necessarily determinative of statutory liability, Lefton's intent to indemnify Kerr-McGee should be considered in the allocation of cleanup costs. In determining the relative contribution of the parties, courts must look to the "totality of circumstances." *Environmental Transportation Systems*, 969 F.2d [503,] at 509 [(7th Cir. 1992)]. That Lefton - with knowledge of the creosote on site - agreed that it took the property "as is" and would assume all future liabilities resulting from that pollution is certainly a significant circumstance. The fact that Kerr-McGee's predecessor Moss-American was the source of most of the pollution at the site may also weigh in the court's analysis; this, however, is not reason to ignore other relevant considerations.

14 F.3d at 326.

The same analysis applies here. The Court of Appeals for the Third Circuit has, in this case, determined that the indemnification agreement is not legally sufficient to shift

responsibility for Mead's CERCLA costs to Beazer. Nonetheless, if Mead can establish that there was an intent to make such an agreement, but that the intent was not realized, then that would be a factor worthy of consideration.

Also, even if no such intent is established, the fact that the sale was made "as is" and that the principle of caveat emptor applied would nonetheless be entitled to some consideration as equitable allocation factors. *See, Smith Land & Improvement Corporation v. Celotex Corporation*, 851 F.2d 86, 90 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) ("We conclude, therefore, that under CERCLA the doctrine of caveat emptor is not a defense to liability for contribution but may only be considered in mitigation of amount due.").

The questions to be answered at the appropriate time are, then, are: (1) whether Mead has established that the parties intended to enter into a contract of indemnification which would include CERCLA liabilities; (2) whether the property was sold "as is" and with acceptance of all faults inherent therein; (3) whether the sale occurred under the doctrine of caveat emptor; and (4) what effect any of these factors which are found to exist should have on the equitable allocation of response costs. These matters will be addressed in the ensuing proposed findings of fact. It sufficient at this stage, however, to note that the court has not been foreclosed by the opinion of the Court of Appeal from considering these facts in reaching a recommended appropriate equitable allocation.

2. PROPOSED FINDINGS OF FACT

A. Uncontested facts.

The parties have filed a stipulation of facts (Docket #270) and, apart from that stipulation, do not seriously contest

several other relevant facts. Proposed findings of fact premised upon these stipulations will be set forth prior to proposed findings made with respect to the remainder of the record.

1. Each of the three parties in this case, Mead, Beazer and KII, has, at one time, owned and operated the Woodward Coke Plant, which is located in Alabama.

2. The Plant sits upon approximately 170 acres of land. Coking operations at the site began under the ownership of Woodward Iron Company 1911, and continue to the present day.

3. Mead, due to its 1968 acquisition of Woodward Corporation, is deemed to be the owner and operator of the site from 1911 until Mead sold the Plant and the accompanying land to Beazer in 1974.

4. From October 31, 1974, until December 29, 1988, Beazer owned and operated the site[3].

5. In December, 1988, Beazer sold the operational portion of the Plant, including approximately 83 acres of land, to Koppers Industries, Inc. (KII).

6. KII presently owns and operates the Plant. Beazer has retained the remaining 87 acres of land.

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[3] For some portion of Beazer's use the site was operated under a sale/leaseback arrangement with the Industrial Development Board of Fairfield, Alabama. Nonetheless, Beazer had effective control and ownership of the site during the entire period from October 31, 1974, through December 29, 1988.

7. Beazer has contractually agreed to indemnify KII for any costs associated with environmental liabilities arising from contamination which existed prior to the 1988 sale.

8. There has been a lake on the property during the entire period of coking operations. This lake has been used for various purposes, including as a recirculating basin for cooling water, and was also a collecting point for drainage from various portions of the site. This has resulted in the accumulation in the lake bed, at various times, of toxic substances.

9. The types of wastes which flowed into the lake include coal fines and other wastes associated with the coking and by-product activities at the plant. The lake has been dredged on more than one occasion. The materials dredged from the lake have been disposed of both on-site, and off-site.

10. Coking operations on site began in April, 1911, when a battery of sixty by-product coke ovens was placed into service after their construction by Beazer[4]. This battery of ovens is referred to as Battery No. 1.

11. An additional eighty by-product coke ovens, referred to as Battery No. 2, were constructed by Beazer on site and were placed into operation on August 4, 1913.

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[4] The entity which constructed the ovens was the H. Koppers Company. Beazer has conceded that it is liable for the acts and liabilities of the Koppers Company, Inc., and its predecessor which include the H. Koppers Company and American Tar Products Company. Hence, all of these entities will be referred to collectively as "Beazer."

12. Battery No. 3, consisting of thirty by-product coke ovens, was constructed by Beazer and put into operation in December, 1914.

13. In 1914, Mead began operating the Edison Company light oil refining plant, which recovered usable by-products from the coking process.

14. In 1917, Battery No. 4 was placed into service, consisting of 60 ovens constructed by the Wilputte Coke Oven Corporation.

15. In 1916, Beazer began processing coke over tar at a plant (the "Tar Plant") across the street from the Coke Plant. Beazer operated the Tar Plant until its sale to KII in 1988. KII has operated the Tar Plant since that time.[5]

16. For most of its history, the Tar Plant was linked to the Coke Plant by a tar pipeline through which coal tar was pumped, and a gas pipeline through which coke oven gas was pumped to the Tar Plant. The coal tar was refined at the Tar Plant into various products. The coke oven gas was used as a source of heat and power at the Tar Plant.

17. A new light oil plant began operations in 1949 after being constructed by Beazer. The tar pipeline was replaced in 1951, and again in 1970.

18. On February 2, 1974, the light oil refining plant was permanently shut down.

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[5] The Tar Plant is also undergoing a site-wide facility investigation pursuant to the Resource Conservation and Recovery Act (RCRA) which is not the subject of this lawsuit (Docket #287 at 61).

19. In 1975, the coal washery was shut down (Beazer thereafter purchased "pre-washed" coal).

20. In 1977, the in-ground decanter tanks were replaced, and a new ammonia still was installed.

21. In 1978, a wastewater treatment plant was built and put into operation.

22. By 1980, tar decanter sludge, one of the toxic wastes produced during the coking process (designated under RCRA as K087), was recycled into the coke ovens and "rebaked." This was accomplished by mixing tar decanter sludge with coal on the open ground.

23. Sometime before 1986, a concrete pad was installed, and the mixing of coal tar sludge with coal was done on the pad. On May 26, 1986, a hopper was installed for the mixing of KO87 coal tar sludge so that it could be recycled into the ovens without any leaching into the soil.

24. Beginning in November, 1985, lime was no longer used for the ammonia still, and was replaced by liquid caustic.

25. KII upgraded the wastewater treatment plant in 1989, and installed additional cooling towers. KII also upgraded the surface water containment system.

26. KII installed a benzene emissions capturing system in 1991.

27. The by-product coking process involves placing coal in an oven and heating the coal, in the absence of air, to extremely high temperatures. The coal is "baked" for between 16 and 36 hours. During this process, the "by-products"

associated with coal are removed. A by-product plant captures these excess products as steam, and, through various processes, captures the constituents which include tar, benzene, natural gas, and other useful products.

28. During the course of the coking process, including the by-products recovery process, various waste products are produced. The specific types of waste are, however, not relevant to the court's allocation since the parties have stipulated to the following facts:

a. The types of contaminants generated during the operations at Woodward Coke were similar for Mead, Beazer and KII.

b. The unique production wastes generated by Mead were associated with the light oil refining process, and the production wastes unique to Beazer's and KII's operations were associated with the waste water treatment plant.

c. The wastewater treatment plant solids generated from coke plant production after 1974 were no more toxic than the coke plant production wastes unique to the pre-1974 operations.

d. with respect to wastewaters, the wastewater treatment plant effluent is no more toxic than the untreated wastewaters that had historically been discharged into the Coke Plant lake or Opossum Creek.

(Docket #270, stipulations of fact 56-59).

29. Beazer has conducted remediation at three sites, on the Plant property pursuant to §3008(h) of the Resource

Conservation and Recovery Act (RCRA), 42 U.S.C. §6928(h).

30. After discussions with State (Alabama Department of Environmental Matters, or "ADEM") and federal (United States Environmental Protection Agency, or "USEPA") regulatory bodies in 1985 and 1986, Beazer agreed to close three areas of the Plant which were designated by USEPA and ADEM as Hazardous Waste Management Units (HWMU's).

31. There are now three HWMU's which are subject to RCRA's "post-closure" requirements. These units are designated as Solid Waste Management Units (SWMU's): Unlined K060 waste pile (SWMU 1); Unlined KO87 (coal tar sludge) waste pile (SWMU2); and Unlined KO87 (against coal tar sludge) waste pile (SWMU 3).

32. Beazer has conducted groundwater monitoring and reporting associated with the three RCRA units since 1986 in accordance with its obligations arising from its agreement with regulatory agencies.

33. Beazer and USEPA are the only named parties to a 1991 Administrative Order on Consent pursuant to which Beazer has conducted an investigation of the Plant site.

34. An approved RCRA Facility Investigation (RFI) Work Plan was submitted to USEPA by Keystone Environmental Services on behalf of Beazer in September, 1991.

35. The RFI field effort was begun in February, 1992, and completed in August, 1996.

36. Beazer submitted its Draft Phase I and II RFI and Groundwater Assessment Report to USEPA and ADEM on March 6, 1997.

37. In addition to the RFI requirements of the RCRA Order, the Draft RFI Report addresses ADEM's requirements to complete a Groundwater Quality Assessment as well as the groundwater data requirements associated with post-closure permitting.

38. At least some of the costs which Beazer has incurred pursuant to the RCRA Order at Woodward Coke are recoverable response costs which were necessary and were incurred consistent with the National Contingency Plan (NCP).[6]

B. Contested facts.

The following is a summary of the testimony given at the hearing in this matter. Proposed findings of fact follow each witness' testimony.

WITNESSES

Mitchell Brourman

Mr. Brourman is the environmental manager for Beazer East, Inc., a company with which he has been employed since

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[6] Based upon this stipulation, which is actually as much a conclusion of law as a stipulation of fact, the parties do not, at this time, seek to determine whether any specific cost incurred to date by Beazer is recoverable. Instead, the parties agree that the question of the recoverability of specific costs will be left to a later phase of this proceeding." (Docket #292 at 24-25).

1991 (Docket #286 at 72). He has a master's degree in hydrogeology, and has previous employment experience as a hydrogeologist. Hydrogeology is a field in which the fate, transport, movement and occurrence of groundwater and groundwater systems are studied (*Id.*, at 76).

Mr. Brourman's position involved his participation in field projects prior to 1995. Since that time, he has been given greater authority over administrative matters, purchasing and liaison activities with respect to environmental field projects (*Id.*, at 81). Mr. Brourman's duties with respect to the Woodward Facility include: fiscal responsibilities; participation in the decision to hire consultants; reviewing invoices; insuring compliance with applicable environmental regulations and orders; acting as liaison between Beazer and ADEM; and technical guidance to the company consisting of assisting in review of compliance procedures and specific expertise in groundwater remediation (*Id.*, at 82-84). He has had personal involvement in Beazer operations at the Toledo coke plant, the St. Paul coke plant and the Kearney Seaboard coke plant (*Id.*, at 84-85).

Mr. Brourman's initial involvement at Woodward was as a project manager during field investigation activities in 1992 (*Id.* at 86). He has visited the plant on about six occasions during his tenure at Beazer (*Id.*, at 87).

Mr. Brourman had "intimate review responsibilities" for the RFI which was submitted to USEPA and ADEM (*Id.*, at 92). He identified the "Part A" permit application which was filed for the Woodward Facility pursuant to RCRA regulations on November 19, 1980 (*Id.*, at 12; Plaintiff's Exhibit 346). The permit application identifies two wastes which are generated and stored on site, K060 (ammonia still lime sludge) and K087 (tar decanter sludge) (*Id.*, at 13). The

application shows the former being stored in an equalization tank which is part of the waste water treatment plant, and the latter located in an area by the north landfill (*Id.*). These were identified as "RCRA regulated units" which are areas that are subject to RCRA permitting requirements for storage, treatment or disposal of hazardous waste (*Id.*, at 15).

Beazer was notified by the EPA for the first time in 1985 or 1986 that the historic treatment and disposal of hazardous waste at the Woodward site was a concern under RCRA, as opposed to present practices, such as the operating RCRA units already identified at that time (*Id.*, at 17-21; Plaintiff's Exhibit 369, a letter from USEPA dated March 13, 1986). This came as a result of the enactment of the HSWA amendments to RCRA which address historic disposal practices (*Id.*, at 22).

Beazer notified Mead on September 18, 1986, that historical waste disposal practices may be the subject of a RCRA §3008(h) corrective action order (*Id.*, at 23; Plaintiff's Exhibit 382). Mead responded to the letter by denying responsibility for the questioned waste disposal practices (*Id.*, at 24). The responsive letter from Mead references the Asset Purchase Agreement, and states Mead's position that Beazer has assumed all liability for "solid waste matters" (Docket #288 at 2-4; Defendant's Exhibit l).

On March 22, 1988, Beazer notified Mead that a USEPA contractor was about to conduct a facility assessment of the Woodward Plant (Plaintiff's Exhibit 405). That assessment was conducted on April 11 and 12, 1988 (*Id.*, at 27). The assessment report was prepared in May, 1988, by A.T. Kearney, Inc. (Plaintiff's Exhibit 406). The report reflects the result of a visual site inspection and the identification of "solid waste management units" (SWMUs) and "areas of concern"

(AOCs). The former are areas in which hazardous waste is presently being stored, and the latter are areas suspected to have been used for historical waste disposal practices (*Id.*, at 29). The report identified 39 solid waste management units (SWMUs), including the three RCRA regulated units identified in the Part A application (*Id.*, at 30). Four AOCs were identified.

In October, 1990, Beazer received a proposed consent order pursuant to §3008(h) from the EPA (Plaintiff's Exhibit 425). On November 28, 1990, Beazer notified Mead of this proposed order, and invited Mead to participate in the negotiation of a final order on consent (Plaintiff's Exhibit 427). Mead did not participate (*Id.*, at 32).

After negotiation with USEPA, Beazer, through Keystone Environmental Resources, Inc., submitted a RCRA facility investigation work plan (*Id.*, at 37; Plaintiff's Exhibit 1325). The work plan was designed to address the 39 SWMUs and 4 AOCs, but focused on the entire site for investigational purposes (*Id.*, at 38). The reasons for this approach are set forth in the work plan:

> EPA identified a number of Solid Waste Management Units (SWMUs) and Areas of Concern (AOCs) at the facility in a RCRA Facility Assessment Report (A.T. Kearney, 1988). Due to the size of plant, the close proximity of SWMUs and AOCs, and the impossible task of defining the potential release from each individual unit, potential releases from the entire site will be investigated rather than investigating the potential release from each SWMU or AOC individually.

(Plaintiff's Exhibit 1325 at I-2; Plaintiff's D-3). The same document identifies the "specific objectives of the RFI" as follows:

- Augment data previously collected at the site;
- Identify and define the nature and extent of constituents that may have been released from SWMUs and AOCs at the site;
- Identify potential migration pathways;
- Define the potential for migration of constituents at the site;
- Identify the potential environmental impact and potential risk to human health and the environment; and
- Gather necessary data to support the evaluation and selection of corrective measures alternative, if necessary.

(*Id.*, at 39-40; Plaintiff's Exhibit 1325 at I-2).

Mr. Brourman had some hands-on involvement in the site investigation that followed, and helped prepare the RFI report which was submitted to USEPA and ADEM in March, 1997 (*Id.*, at 41; Plaintiff's Exhibit 1338). In that document, the reasons for choosing the whole-site approach are repeated, as are the goals of the RFI. Those goals are slightly restated as follows:

1. Characterize the nature and extent of constituents of interest (COIs) within and beyond the facility boundary;

2. Determine and characterize the sources of COIs;

3. Define and characterize the potential pathways of constituents migration;

4. Identify and characterize actual and potential human and environmental receptors and assess the potential risks posed to such receptors; and

5. Gather the data necessary to support the development, evaluation, and selection of corrective measures alternatives, as necessary.

(*Id.*) Phase I of the field work began in 1992. USEPA required a second phase of field work, which began in 1995 (*Id.*, at 46-47).

Mr. Brourman described in some detail the investigative efforts actually performed. The details of that investigation are not relevant to this report. At the time of his testimony, however, Beazer had expended over $4.3 million during the RFI portion of the investigation, and remediation was expected to begin in September, 1997, and last for 2 to 3 years (*Id.*, at 55-56). The amount does not include the three RCRA regulated units (*Id.*, at 64).

Mr. Brourman conceded that it is at least possible that no remediation will be necessary at the site (Docket #288 at 8-9).

On cross-examination, Mr. Brourman noted that some limited resampling was required with respect to the Phase I

sampling program due to "problems with the quality control aspects of the sampling at the laboratory." (*Id.*, at 9-10). No additional charge was included for this resampling, since the subcontractor was held responsible for providing quality work, and was not paid additional compensation for performing the resampling (*Id.*, at 19). Further, costs associated with wells installed to monitor the RCRA regulated units are not included in the investigational costs sought by Beazer in this action, although information from those wells has been used in the preparation of the RFI (Docket #288 at 65-66).

Landfills 1 and 2 are not identified as either primary or secondary areas of interest in the RFI report (*Id.*, at 11). A significant amount of investigative work was done with respect to the landfills, however, including cross-section sampling (*Id.*, at 13).

Wayne M. Grip

Mr. Grip is the co-founder of Aero-Data Corporation, which is an entity specializing in "aerial mapping and environmental studies using aerial photography and historic maps." (Docket #207, Tab 5 at 1). He has previously testified as an expert in photogrammetry and photo interpretation (*Id.*, at 2-5). He was qualified in this case as an expert in aerial photogrammetry and aerial photographic interpretation (Docket #288 at 92). Mr. Grip was asked by Beazer to study historical aerial photography of the Woodward site and identify "the generic or the typical environmental types of features that have resulted or typically do result in contamination of a site." (*Id.*, at 93). He was also asked to perform, and did perform, calculations concerning the volume of wastes in two on-site landfills relying upon aerial

photographs of the site from different historic dates (*Id.*). He did this through terrain modeling and photogrammetry.

Mr. Grip's testimony was certainly the most technologically assisted presentation in this case. He provided the court with photographs which had been modified to be viewed in three dimensions; he provided historic photographs as well as historic maps. During his testimony, he utilized a high resolution projection system attached to a computer which generated digital photographs (*Id.*, at 94).

The first step in Mr. Grip's work was to obtain any and all historic aerial photographs of the site in question, as well as maps of the area (*Id.*, at 98). He noted that he is, in such cases, often dealing with second or third generation film, in the sense that he is obtaining not the original negative film used, but a copy made from a positive produced from the original negative. This results in some loss of resolution (*Id.*).

The film which is obtained is then "photo-indexed" whereby the center of each photograph is plotted on a map of the area. A set of similarly sized prints of the photographs is then made, and each is scaled, oriented and cropped in the same manner, so that one may flip from one historic photograph to the next and compare the same area or feature in one to the same area or feature in another (*Id.*). "Stereo" prints are then developed, which are prints of the same or of overlapping areas of the map. The difference in distance from the lens for each photograph provides a means by which the height of objects pictured may be derived, and by which terrain maps may be made (*Id.*, at 101-02).

Once all of the information is obtained, it is transferred to a stereoplotter which, in Mr. Grip's words, "can zoom in very, very closely into the aerial photography and allow the

operator to see it in full stereo with very good resolution." (*Id.*, at 106). "Stereo pairs" of photographs are obtained, that is, pictures of the same features or area are made from overlapping photographs. The overlap in the photographs means that the same area has been photographed from two slightly different angles. This difference in "parallax" offers the photointerpreter the ability to use a mirror stereoscope, with both pictures underneath it, to see a three-dimensional image (*Id.*, at 111-12).

The writer does not wish to oversimplify the process by which photogrammetry is accomplished. The court is satisfied that methods of producing terrain maps from historic photographs were proper and that representations of the site in the three maps prepared by Mr. Grip are as accurate as the process permits.

The three terrain or contour maps presented by Mr. Grip are for the years 1948, 1971 and 1993 (*Id.*, at 124; Plaintiff's Exhibit 1100, pages entitled "Contour Map of Landfill Areas") (it must be remembered that these dates are dictated not simply by historic dates which may have meaning in the context of this litigation, but also by the availability and quality of aerial photography of the site). The witness also testified that he mapped the terrain from a series of photographs taken in 1940 (*Id.*, at 124-25). On each of the three maps, Mr. Grip has identified "landfill" areas. These are areas which other testimony and evidence of record, as well as Mr. Grip's photo interpretation, identify as being the areas where wastes from the plant site were disposed. Mr. Grip, using stereo pairs for each of those dates, calculated the volumes of the landfill areas identified on the maps of the site for each date (*Id.*). From these calculations he reaches the conclusion that 79% of the total volume of waste placed in the

two landfills between 1940 and 1993 was placed there prior to 1971 (Plaintiff's Exhibit 1100).

Mr. Grip was asked to explain the methods by which he checked the accuracy of his computations. With respect to horizontal accuracy, he used a method of overlapping the photographs in areas with fixed features, such as buildings, and producing an exhibit which showed in different colors the outlines of such features, and showed how closely they matched from photograph to photograph (Tr. 126; Plaintiff's Exhibit D-7). The exhibit is called a "composite planimetric map" (*Id.*, at 127).

With respect to the vertical accuracy of his measurements, Mr. Grip again explained the manner in which he obtained the volume of the landfills for his starting date of 1940:

> . . . basically I used the 1948 stereo photography with the mirror stereoscope, and I measured the height above surrounding terrain of the southern landfill at multiple locations by comparing it with the height of small vehicles in the parking lot. And in this way I was able to derive an average thickness for the landfill as it existed already in 1948.
>
> And I repeated that process for the 1940 date and earlier date, subtracted the 1940 thickness from the '48 thickness, and arrived at the increase in thickness of the landfill for that period. So this thickness times the surface area of the landfill equals the increase in volume for that period . . . .

* * *

> Then for the 1948 to 1971 percent, as I described earlier, I used the TIN derived from the '48 contour map and the TIN derived from the '71 contour map and calculated the added volume to the southern landfill between the two dates using the terrain modeling software.

(*Id.*, at 128).

Mr. Grip testified that he concluded, based upon his calculations, that 227,294 cubic yards of material were placed on the landfills on site between 1940 and 1993, and that 46,877 yards of materials were placed on those landfills after 1974 (Tr. 183-84).

Mr. Grip was also asked to interpret photographs and the images which appeared thereon historically. The witness described the conclusions he drew concerning the site from his interpretation of several photographs. In comparing aerial photographs From 1940 and 1945, he noticed an increase in height in the area of the northern landfill (*Id.*, at 136-37). He also compared the condition of trenches, a sump, turbid water beyond an earthen dam, and fluid flowing in channels from a cooling pond (*Id.*, at 137; Plaintiff's Exhibit 1100, photographs of 11/17/40 and 8/28/45). He also identified areas on which dark materials are stockpiled.

The next photograph is dated 1/15/48. Mr. Grip again identified material stockpiles which are changing in shape from previous photographs, and an increase in the volume of the southern landfill (*Id.*, at 138). He identifies a "braided stream" effect where water from the plant is entering the plant lake, indicating the presence of sediment and particles in the water settling out into the lake. He also notes a "plume" in the

lake indicating the presence of something, such as an oil slick or particles in the water (*Id.*, at 138-39).

Similar interpretative work was done with respect to photographs dated 3/31/51, 1/9/56, 11/2/60, 3/66, 2/21/70, 1/27/71, 4/29/73, 1/9/76, 3/15/78, 12/18/82, 12/29/85, 3/5/90 and 3/29/93 (Plaintiff's Exhibit 1100, section entitled "Interpreted Images of the Woodward Coke Plant from 11/17/40 through 3/29/93). Mr. Crip then furnished a summary of his conclusions from the interpretation of the photographs listed above:

LANDFILLS

- Southern Landfill - The Southern Landfill is visible and active in the photography of 11/17/40. By 12/1/75, the landfill is inactive.

- Northern Landfill - The Northern Landfill is first seen in the photography of 3/7/52. By 8/28/85, vegetation is returning within this inactive landfill area.

- Third Landfill - A third landfilling operation is visible in the photography of 11/17/40. This landfill is inactive by 8/28/45.

WATER BODIES

Prior to 1974, surface runoff from the stockpiles on the western side of the Site and discharges from the coke plant flowed directly into Pond 1 with little or no evidence of treatment. Plumes were detected in the surface water of Pond 1 and a large mud flat area grew in the northern portion of the pond over time. These features evidence the ongoing discharges from the plant area to the north. Plumes were much less noticeable in Pond 1 after 1/9/76.

After 1974, significant changes were made to the existing ponds, and new ponds were constructed. The new ponds received some of the discharges that formerly flowed into Pond 1 and appeared to be used as settling basins. Pond 2 which is also called the "cooling pond" was filled in and the area converted to a parking lot by 10/8/78.

TRENCHES

Trenches are visible in the photography from 11/17/40 through 2/24/81. Fluids and solids were detected in these trenches on most dates. The trenches are somewhat smaller in surface area after 2/22/73 and are no longer visible after 2/24/81. The trenches were used for the disposal of waste materials. Most, if not all, of the disposal occurred prior to 1974.

DARK STAINING

Dark staining was mapped in the photography on numerous dates, both before and after 1974, in the southern portion of the processing area. Drainage in this area flowed toward Pond 1 and Pond 5. It is my opinion that the dark staining results from ongoing leakage or spills from the area of the nearby pump houses or tanks.[7]

(*Id.*, section entitled "Summary of Conclusions"; Plaintiff's Exhibit D-9; Docket #288 at 171-177). In making this report, Mr. Grip relied upon 8 maps of the area and 48 separate photographs of the site (Docket #207, Tab 5, Attachment A).

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[7] It should be noted that, during the hearing on this matter, the court sustained an objection to Mr. Grip's testimony that the dark staining was caused by a spill of liquid (Docket #288, at 145-148). The undersigned later noted that Mr. Grip could properly testify that the dark stain is consistent with a spilled liquid or liquid on the ground from some source (*Id.*, at 162).

On cross-examination, Mr. Grip conceded that while he is a member of the American Society for Photogrammetry and Remote Sensing (ASPRS), he is not certified by that entity (Docket #288 at 185-86). Mr. Grip did not visit the Woodward Coke Plant, nor did he personally take aerial photos of the site (Docket #289 at 2).

Mr. Grip also conceded that there is a subjective element involved in photo interpretation (*Id.*, at 6). There is also a subjective element in photogrammetry, and a margin of error inherent therein (*Id.*, at 6-7).

When conducting photogrammetry, it is better to have the original film to work from. If the original film is not available, then a second generation contact film print, rather than a paper print, would be preferable (Docket #289 at 22-23). As noted earlier, each generation of reprints results in a loss of resolution. Further, film prints have less inherent loss of resolution than would a paper print.

Mr. Grip explained the manner in which he determined the vertical precision of his photogrammetry, i.e., how he determined the precision of the measurements of depth which he used in calculating the volume of he landfills on varying dates. He did this by measuring certain "control points" thirty times through using the stereoplotter and determining the standard deviation of those measurements (Docket #289 at 31). He used as control points the rooftop of a building or other feature which would not change in elevation over time (*Id.*, at 32).

Gabriel Lucisano[8]

Mr. Lucisano was retained by Mead to review Mr. Grip's expert report, with particular attention to the volume calculations contained therein (Docket #293 at 25). Mr. Lucisano is Manager of Photogrammetry and Environmental Services for IntraSearch, Inc. (*Id.*, at 12). He has 20 years experience in photogrammetry, and is a Certified Photogrammetrist as recognized by the ASPRS (Docket #216, Tab D). He has participated personally in over 300 projects, including 47 which involved volumetric mapping (*Id.*). IntraSearch was founded in 1951, and has an extensive historical aerial photography library (Docket #293 at 15). Mr. Lucisano has personally performed approximately 15,000 hours of photo interpretation and has been involved in about 50 historical aerial photography projects, and about 50 projects, both current historical, involving volume calculations (*Id.*, at 17).

Mr. Lucisano was offered and found qualified as an expert in the field of mapping sciences, and in particular of all aspects of photo interpretation and photogrammetry (*Id.*, at 24-25).

Mr. Lucisano stresses in his report that aerial photography, and in particular historical aerial photography,

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[8] Mr. Lucisano testified during Mead's case-in-chief. Although his testimony is several witnesses removed from Mr. Grip's, Mr. Lucisano's testimony is addressed specifically to Mr. Grip's report and conclusions. Hence, Mr. Lucisano's testimony is summarized in this report immediately following the summary of Mr. Grip's reports and testimony. The undersigned will group other witnesses in like fashion where appropriate in an attempt to make this report more useful to and convenient for the court.

is not an exact science (*Id.*). Under the best of circumstances, using state-of-the-art equipment and proper procedures with new photography, computations within plus or minus 1% of actual conditions may be attained. In his opinion, interpretation of historical photographs without control measures such as surveyed ground control cannot approach the level of accuracy claimed by Mr. Grip.

Generally accepted industry standards for photogrammetry set forth maximum flying heights for photographs, maximum photo enlargement ratios and surveyed ground control. None of these elements is present with respect to the historical photography which Mr. Grip used in this case. Thus, in Mr. Lucisano's view, the following questions are left unanswered by the Grip report:

> Quadrangle maps used to "scale" and "orient a work print" are only accurate horizontally within 50 feet, and vertically within 10 feet.
>
> Camera accuracy as measured by focal length and lens distortion is unknown.
>
> Mapping should be done with only the original copy negative, as each generation of reprints and copies diminishes accuracy.
>
> The earliest photograph available from which volume calculations are made does not give information concerning virgin ground conditions (i.e., whether the material seen is filling a ditch, or covering a rock).

(Docket #216, Tab D). Mr. Lucisano opines that the photographs relied upon by Mr. Grip have expected errors in elevation measurements of between 2 and 5 feet, depending

upon the height at which the photograph was taken, in Mr. Lucisano's view, the volumes reported by Mr. Grip could be inaccurate by as much as 50%. Mr. Lucisano testified that, in his view, Mr. Grip's report "lacked a serious discussion about the inherent errors that are involved in deriving volume information specifically from historical aerial photography." (Docket #293 at 26). He also reviewed Mr. Grip's supplemental report, and found therein "some curiosities and other discrepancies" (*Id.*, at 27).

Mr. Lucisano was present in court for Mr. Grip's testimony, and he also reviewed Mr. Grip's deposition testimony and his report and rebuttal report. Mr. Lucisano offered more detail concerning his criticism of Mr. Grip's work at the hearing:

> My original suspicions are more or less confirmed in the sense that Mr. Grip tries to minimize horizontal error and he does it incorrectly. He tries to compensate for vertical error, and -- in some fashion, which I still don't understand, and he improperly uses standard deviation to try to calculate a maximum error for his volume calculations.

(*Id.*, at 28).

Mr. Lucisano testified that his company's "confidence" concerning a current volume calculation, based upon present photography, entails an assumed error of between 2 and 5 percent (*Id.*, at 31). Mr. Lucisano detailed the requirements which, in his opinion, permit the photogrammetric volume calculation to be presumed to be that accurate. Those requirements are: (1) the accuracy requirements of the client; (2) a photo mission flown with a precision mapping camera; (3) a camera calibration report establishing that the camera

used was calibrated as required by the United States Geological Survey; (4) the proper film type; (5) a series of ground control points verified by actual ground survey; (6) a flight with proper planning and altitude; and (7) use of the correct contour interval for the altitude chosen (*Id.*, at 32-33).

Mr. Lucisano testified that Mr. Grip had available to him one of three types of film for use in his photogrammetry: (1) a copy negative; (2) a die positive; or (3) a paper contact print. IntraSearch would never map off of a paper contact print because paper "is subject to shrinking and swelling depending upon humidity conditions." (*Id.*, at 33). The historical photos relied upon by Mr. Grip were flown at 6000 feet, which could translate into an error from use of paper contact prints of "tens of feet horizontally and feet vertically." (*Id.*, at 34).

With respect to the mapping cameras used, there was no calibration report available for many of the historical photographs. This would prevent Mr. Grip from determining the particular lens distortion of the cameras used (*Id.*, at 35-36).

Ground control points should also be established, both for historical and present photography, by the use of a ground survey crew (*Id.*, at 36). This would be done with existing photography by identifying existing features and obtaining a ground survey positioning so that these "ground control points" could be connected to one another and tied back in to the geocoordinate system used in the stereoplotter (*Id.*, at 36). Mr. Grip used as vertical and horizontal control points the coordinates provided on USGS "quadrangle" maps. This type of system could reasonably be assumed to include errors of between 10 and 20 feet vertically (*Id.*, at 37).

Mr. Lucisano further explained what he perceives as an error on Mr. Grip's part. In creating his base map and control points from the USGS quadrangle, the maximum horizontal error as to each point is 50 feet. Mr. Grip assumed that if he was using only a portion of the quadrangle section that the maximum error reduces in kind, so that if he uses half of the map, the maximum error is cut in half to 25 feet (*Id.*, at 42-44). Thus, in Mr. Lucisano's view, the use of exact coordinates obtained by ground survey techniques is essential to minimize possible error.

The contour interval of the analytical stereoplotter used is also important in limiting the horizontal and vertical error. The calculation of the contour interval is made by dividing the height of the aerial photograph by the "contour factor" of the particular stereoplotter (*Id.*, at 46). A "first order analytical stereoplotter" has a C-factor of 2500, which may be adjusted up or down depending upon conditions. With perfect conditions it may be adjusted up to 3000, and with imperfect conditions should be adjusted downward. The photographs relied upon by Mr. Grip Were taken at 6000 feet under imperfect conditions (historical photographs without information on camera calibration and with, in some cases, paper contact prints). Thus, the C-factor should have been, in Mr. Lucisano's view, 2000, yielding a contour interval of 3 feet (*Id.*, at 45-46). Generally, a lower flown photographic mission if done with a calibrated camera and accurate film will produce a higher contour factor and a lower contour interval. The lower the contour interval, the more accurate the interpretation of the resulting photographs is likely to be. In Mr. Lucisano's view, it is "imperative" to know the C-factor of the analytical stereoplotter (*Id.*, at 45). Mr. Grip testified that he was not certain of the C-factor of his stereoplotter. Mr. Lucisano testified that the 2-foot contour interval assumed by Mr. Grip should have been 3 feet (*id.*, at 47).

Mr. Lucisano also indicated that Mr. Grip confused instrument precision with accuracy. Accuracy involves a test of how closely the measurements taken by an instrument reflect the true conditions. Precision merely reflects the relationship between measurements (*Id.*, at 48). Mr. Grip's attempts to establish accuracy through repeating measurements 30 times are misguided. This is so since the true test of accuracy is the actual height of various control points. Mr. Grip never obtained such measurements, although he could have (*Id.*, 48-50, 56). In short, "reading the same point over and over again" does not establish the literal accuracy of the height of that particular point (*Id.*, at 51).

Mr. Grip also used, for his base year calculation of volume in 1940, photointerpretation as opposed to stereoplotting. This, in Mr. Lucisano's view, is entirely unreliable (*Id.*, at 54).

Mr. Lucisano would expect, using the information available to Mr. Grip, but using ground control points and other methods not employed by Mr. Grip, to be able to derive a volume calculation which had a potential error of between 20 and 25 percent (*Id.*, at 59). He was unable to assign a percentage of potential error to Mr. Grip's work (*Id.*, at 60).

39. The relative amount of waste placed in the landfills at the Woodward site is relevant to the determination of the contribution of each party to the contamination of the site. The relevance of this information is not merely in terms of the amount of hazardous waste placed in the landfills which has required investigation and may require remediation. It is also relevant to determining the amount of waste produced by each PRP and disposed of on-site. It may be assumed that the amount of waste of all types placed in the landfills generally reflects the amount of production activities on site during the

relevant time periods (See also Proposed Findings of Fact following summary of Gordon Rausser's testimony).

40. The parties do not contest that hazardous wastes were disposed of in the landfills on site. Indeed, the record reflects that various types of hazardous substances were routinely placed in the landfills. This included coal tar sludge, naphthalene and tar, as well as plant materials such as piping and brick which were encrusted with such substances (*See, e.g.*, Deposition Excerpts from the Testimony of Dan Collins, Charles Ethridge, Charles Patton and Charlie Taylor).

41. The difficulty with Mr. Grip's analysis is that it attempts to prove too much. There is no dispute that the site has been subject to poor environmental practices historically. There is also no dispute that those practices improved over time, and particularly so since Beazer purchased the site in 1974. Thus, Mr. Grip's evidence, through photointerpretation, concerning historic spills and other sources of contamination are cumulative of other, more direct evidence in the form of the testimony of former employees, as well as historical documents.

42. Mr. Grip's attempts to establish with near precision the amounts of waste which each PRP contributed to the waste piles on site is overambitious. The court is convinced that his methods do not yield precise results; rather, they yield only rough estimates of the amount of waste produced and disposed of on-site.

43. A rough estimate may as easily be obtained by other means, such as years of use by each party, or amount of wastes generated.

44. A more accurate means of determining the PRP's relative contributions to the site as a whole, and to the landfills in particular, may be obtained by determining the amount of coke produced (and, hence, the amount of hazardous waste generated) on site by the PRPs. This method is addressed below.

45. In summation, Mr. Grip's evidence was informative to the court concerning the nature of the site, and of the manner in which materials were stored and wastes disposed of on site. His testimony was, however, cumulative of other, more direct evidence concerning contamination of the site. Further, Mr. Grip's opinions concerning the contribution of the PRPs to the landfills does not have sufficient reliability to permit a finding by the court except for the very general conclusion that pre-1974 activities resulted in the bulk (i.e., somewhat more than 50%) of the total materials of all types being placed in the landfills.

Carl Lasky

Mr. Lasky is a semi-retired process engineer who worked for ICF Kaiser Engineers (Docket #289 at 76). He holds a B.S. in chemistry and B.S. in education. He worked for Koppers from 1957 until 1996 (*Id.*, at 77). Mr. Lasky has a wealth of experience in all aspects of the construction and operation of coke batteries and coke by-products facilities (*Id.*, at 80-95). The court found Mr. Lasky qualified to testify as an expert "upon all aspects of current and historical carbonization [coking] of coal and byproduct recovery, including construction and operation of coke plants; the

current and historical production processes at coking facilities; and the current and historical generation and disposal of waste [materials] at coking facilities; and the chemical constituents of wastes generated at coking facilities." (*Id.*, at 97-98).

Mr. Lasky prepared an expert report in which he calculated "the volume of products made and waste materials generated, including wastewater, at the Woodward [site] from its inception through the end of 1995." (Docket #207, Tab 6 at 3). Mr. Lasky visited the Woodward Plant on at least 6 occasions prior to 1974, beginning with a visit in 1958, and the prepared a by-product inspection report based upon an inspection he conducted from August 26, 1974 through September 5, 1974 (Docket #289 at 101-105; Plaintiff's Exhibit 325). The inspection report details the types of equipment at the plant, as well as the dates each piece of equipment was built and put into operation, when it was last modified and other relevant information (*Id.*, at 106-07). Mr. Lasky also visited the Plant on at least two dozen occasions after 1974 (*Id.*, at 110). Mr. Lasky conducted the initial survey for the wastewater treatment plant (*Id.*, at 110).

Mr. Lasky's expert report gives an overview of the coking and by-products recovery process. He also gives an analysis of the various chemical constituents of the by-products. Finally, he provides a computation of the volumes of wastes produced during each year of operation.

In making his computations concerning the volume of waste, Mr. Lasky utilized all of the records available to him, including production numbers for the plant, amounts of coal purchased, amounts of coke produced, as well as information on by-products produced and sold (Plaintiff's Exhibit 521, Tab A). From these records. Mr. Lasky determined, for each year from 1911 through 1995, a total amount of coal which

was put through the coking process (Exhibits D-28-30)[9]. For some years, he utilized production records for materials produced by the by-products plant, such as tar, ammonium sulfate, light oil and naphthalene, while in other years he used coal and coke records. Finally, when possible, he used all such records to make his calculations (e.g., 1960-73 when detailed monthly reports were available on coke, coal, gas, tar, light oil, sulfate and naphthalene, Exhibit D-27). He then calculated the amount of waste produced by using generally accepted formulae for determining the amount of waste materials and by-products generally produced from the coking of a specific amount of coal (Docket #207, Tab 6 at 6-9).[10]

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[9] There are two periods for which he lacked sufficient production records to make calculations. These are the years 1937-42 and 1957-59. For these years, Mr. Lasky estimated the amount of coal put through the coking process from information available from surrounding years.

[10] The formulae utilized by Mr. Lasky include the following relationships:

- 1 ton of coal produced 0.7168 tons of coke.
- 1 ton of coal produced 9,386 feet of coke oven gas.
- 1 ton of coal produced 2.63 gallons of light oil from 1911 through 1980.
- 1 ton of coal produced 20.77 pounds of ammonium sulfate.
- 1 ton of coal produced 7.06 gallons of tar.

Mr. Lasky also detailed additional sources of waste materials, such as the wastes associated with the periodic practices of cleaning machinery and equipment (Exhibit D-32; *Id.*, at 11-12).

Mr. Lasky chronicled significant changes in the plant over the years, such as the installation of the first by-products plant on site in 1914 (*Id.*, at 117), the replacement of that plant in 1937 (*Id.*, at 119) and again in 1951 (*Id.*, at 122), and the ultimate closure of the by-products plant in 1974 (*Id.*, at 125). With respect to each historic date where a change in the operations occurred, Mr. Lasky noted that change and any effect it had on the waste streams created on site (Exhibit D-15).

Mead recalled Mr. Lasky to testify in its case-in-chief. Once again, Mr. Lasky's extensive experience with, and knowledge of, coke plants, and the Woodward Facility in particular were explored (Docket #292 at 136-146). In particular, his knowledge of the condition of the facility prior to 1974 was explored, including his assignments in 1974 to determine the amount of coke oven gas the by-products plant could handle, as well as the physical condition of the equipment (*Id.*, at 146). These inspections were done as part of Beazer's preparation for purchasing the plant (*Id.*, at 147), and included an inspection of the coke and coal handling facilities and procedures (*Id.*, at 149-50). Further examination focused on the extent of the inspections, the unfettered access granted to Mr. Lasky by Mead, the nature of the waste

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- 1 ton of coal generates 1.2 pounds of naphthalene at water type final coolers.

(Exhibit D-31).

streams as observed by Mr. Lasky, and the leaks and spills which were evident during the inspection (*Id.*, at 150-172).

46. Mr. Lasky had an intimate knowledge of the Woodward Facility itself both before and after the 1974 sale to Beazer.

47. Mr. Lasky's calculation of the amount of coke produced and, hence, the amount of wastes produced during the operation of the Woodward Plant are based upon adequate and accurate records.

48. Assumptions made by Mr. Lasky concerning the amount of coke produced at the plant, and the wastes produced therefrom, are reasonable. This includes the years in which he had to assume a total amount of coke produced where production records were not available (1937-42, and 1957-59).

49. Mr. Lasky's conclusions concerning which wastes were historically disposed of on-site, and which were disposed of off-site, are credible and convincing. They are premised upon convincing historical records, testimony from eyewitnesses such as former Woodward employees, and Mr. Lasky's own wealth of experience with this particular site and with the coking industry in general.

50. Beazer had available to it, at the time of the 1974 APA, the expertise of Mr. Lasky concerning the waste streams at the Woodward Facility and the manner in which those waste streams were disposed of on-site.

Gordon C. Rausser, Ph.D.

Dr. Rausser is Dean of the College of Natural Resources and the Robert Gordon Sproul Distinguished Professor at the University of California at Berkeley (Docket #207, Tab 7 at 1). He was retained by Beazer to "examine the equitable allocation of response costs at the Woodward Coke Plant" (*Id.*, at 2; Docket #291 at 4). Dr. Rausser has extensive experience in economics and statistics, and has published extensively in the areas of "industrial organization, public policy, agricultural and natural resource economics, and the application of statistical methods" (Docket #207, Tab 7 at 1; Docket #291 at 4-26). The court found Dr. Rausser qualified as an expert "in the area of economics, environmental economics, and economic policy, allocation methodology as it applies to the question of response costs, and the application of such methodology to the facts of this case." (Docket #291 at 30).

Dr. Rausser opines in his report that, relying upon the information obtained by Mr. Lasky, and upon Dr. Lasky's calculations as well as his own, the volume of wastes produced pre-1974 and post-1974 are as follows:

	Solid/Sludges	Process Waste Water
Pre-1974	93%	95%
Post-1974	7%	5%

(Docket #207, Tab 7 at 7). Dr. Rausser then concludes that a "conservative" estimate of the volumetric responsibility for each party would place 90% with Mead, and 10% with the "post-1974" owners, Beazer and KII (*Id.*, at 8).

This estimate is, in Dr. Rausser's view, "conservative" since his calculations do not take into account waste materials generated by routine cleaning and maintenance. Dr. Rausser concludes that if such wastes could be quantified, they would produce more than a 90% allocation for Mead:

> Evidence suggests that the cleaning procedures used by Mead resulted in greater quantities of wastes than did those used by Post-1974 Owners/Operators. Part of the reason for this is that certain processing equipment had been taken out of service by the mid-1970's. Another reason is that as environmental concerns became more publicized in the 1970s, cleaning practices were altered such that negative effects of the cleanings were reduced.

(*Id.*, at 8). Dr. Rausser also did not take into account any wastes disposed of on site from the iron plant operated by Mead from 1910 through 1973.

Dr. Rausser states that the work done by Wayne Grip offers a "check" on the allocation numbers, since it may be expected that on-site landfills would receive wastes at a rate generally consistent with the production of wastes. Mr. Grip's conclusion that 80% of the content of the landfills was placed there between 1940 and 1971, and that 21% was placed there after 1971, is consistent with Dr. Rausser's 90% volumetric allocation to Mead since Mr. Grip's analysis does not address pre-1940 contributions to the landfills, which, or course, constitutes almost 30 years of operation (*Id.*, at 9). Dr. Rausser finds that Mr. Grip's "photointerpretations provide a good estimation of the total volumes of wastes generated and disposed on site" but notes that volumetric calculations would more "fully capture the amounts of process wastes" (*Id.*).

The final portion of Dr. Rausser's expert report applies the "Gore factors" to his suggested volumetric approach. The first Gore factor is the ability of the parties to distinguish their contribution to the discharge, release or disposal of the hazardous waste in question. Dr. Rausser believes this factor is addressed by determining the volumes of waste produced and disposed of on-site by the PRPs (*Id.*, at 10). The second factor, which addresses the amount of hazardous waste involved, is also specifically addressed by a volumetric approach (*Id.*).

The third factor is the relative degree of toxicity of the wastes. This factor is neutral in Dr. Rausser's analysis, although he notes that it may reasonably be assumed that the post-1974 wastes are actually less toxic than the pre-1974 wastes. This is so due to the changes in operations at the plant which included installation of a waste water treatment plant on-site in the late 1979's (*Id.*).[11]

Factor four requires assessment of the relative involvement of the parties in generating and disposing of the wastes. Again, that is, in Dr. Rausser's view, accurately depicted by determining the amount of wastes generated and disposed, of on site (*Id.*, at 11).

Factors five and six, which are the relative care exercised by the parties, and the cooperation or non-cooperation with government agencies, are considered neutral by Dr. Rausser. The first because the parties have stipulated that. they each followed accepted industry practices and standards of care,

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[11] Another change in practice is the practice of "recharging" the coal tar sludge to the ovens, thereby reducing the amount of that waste disposed of on-site (Docket #291 at 61).

and the second because Beazer has "taken the lead" in investigating the site and Mead has refused to participate (*Id.*).

Dr. Rausser repeated the findings from his report in his testimony at the hearing in this case (Docket #291, at 3-146). During his examination, he did, however, elaborate on allocation methods other than purely volumetric allocation. Dr. Rausser identified six types of allocation methods:

1. Volume of contribution;

2. Adjusted volume of contribution;

3. Stand alone cost;

4. Incremental cost;

5. The "Shapely" method;

6. Benefits analysis.

(Docket #291 at 31-33; Plaintiff's Exhibit D-34). The pure volumetric approach allocates responsibility among PRPs simply on the basis of relative volume of contribution of waste. This can be done either by determining the generation of waste, or by "fingerprinting" wastes which are still on-site. The drawbacks to this approach are: (1) the inherent presence of measurement errors arising from the passage of long periods of time during and between contributions; and (2) the inability to "fingerprint" existing waste due to commingling (Docket #291 at 33).

The adjusted volumetric approach employs the "Gore factors" which would allow for allocation on factors other than pure contribution, i.e., other relevant means are provided

for distinguishing between contributing parties. The additional factors include the toxicity or hazardousness of the wastes involved, and other factors which would encourage parties to react responsibly to environmental concerns, and to cooperate with government agencies (*Id.*, at 34-36).

The "stand-alone" methodology involves determining the cost of clean-up associated with each party's particular contribution to the site by assuming that each party was the only party which had contaminated the site. Incremental cost methodology does the same thing, but by assuming that each party was the last party to have contributed to the contamination, and assessing the additional costs caused by their contribution (*Id.*, at 36-37). The "Shapely" method uses a process similar to the stand alone and incremental methodologies, but uses an averaging mechanism to make the process more fair (*Id.*, at 37-38).

The last methodology, the benefits methodology, is to look to the relative benefits which have accrued to the parties economically from their respective contaminating activities, and to allocate costs premised on this (*Id.*, at 38-39).

With respect to Woodward, the appropriate methodology, in Dr. Rausser's view, is the volumetric analysis, with consideration of all relevant Gore factors (*Id.*, at 40). He found that use of methods 3, 4 and 5 would encounter statistical problems involving errors in relating the volume of contribution (since all six methodologies start with volume of contribution) to the response cost actually caused by each party's contribution (*Id.*, at 41-42). Methodologies 3 through 6 also, in Dr. Rausser's view, suffer from the defect that they are either inconsistent with, or stray significantly from, the overall policy of "polluter pays." (*Id.*, at 42-43). The first and second methodologies, which Dr. Rausser applied in this case,

are most consistent with the polluter pays philosophy. This is so, in Dr. Rausser's view, because the most reliable information available concerning contribution are records which reflect the generation of wastes, and disposal of those wastes on-site of off-site.

Dr. Rausser also testified that, if ownership of the property at issue is to be considered as an equitable allocation factor, then the utilization of the property over time should also be a factor considered by the court (*Id.*, at 68-69). This, in his view, is a matter of consistency. Dr. Rausser has concluded, on the basis of the appraisal done by Mr. Carr of the property, and the present value of the land, that the land is actually worth less now than it was when purchased in 1974 (*Id.*, at 71-72). Dr. Rausser, however, chose not to use the benefits methodology in this case (*Id.*, at 72).

Dr. Rausser repeated his proposed allocation of 90% to Mead and 10% to Beazer, and offered his assessment of this allocation as a "robust" conclusion since, even if Mead is correct in its criticisms of his methods of calculation, the numbers would still not change in Mead's favor (*Id.*, at 74-75). He came to the same conclusion after making several adjustments to his underlying facts premised upon Mead's arguments (*Id.*, at 75-76). These included changing production numbers for 1957-59, eliminating possible double-counting of sludge disposal, and changing the assumption used by Mr. Lasky with respect to waste water volume (*Id.*, at 75-77).

Dr. Rausser also filed a rebuttal expert report addressing the expert report filed by Mead expert, Dr. Robert Ball (*infra*). In that report, Dr. Rausser challenges Dr. Ball's allocation methodology as being subjective, and without the "scientific rigor" necessary to justify the conclusions reached

therein (Docket #224, Tab 4). Specifically, Dr. Rausser notes that Dr. Ball's calculations on the basis of volume are made on assumptions concerning years of operations and the like, and that they ignore the more accurate measure of party contribution available through the production records utilized by Mr. Lasky (*Id.*, at 2-3). Further, Dr. Rausser notes that risk-based allocation premised upon a particular PRP's contribution to a specific Operable Unit are moot in a volumetric analysis, since the contribution is accurately reflected in the overall volumetric calculation. Moreover, the parties have conceded the type toxicity of wastes were similar for each PRP. Thus, there is simply no reason to make a volumetric analysis for each of Dr. Ball's proposed OUs (*Id.*, at 1-2).

Roy O. Ball, Ph.D., P.E.

Mead retained the services of Dr. Ball to address the following issues, as outlined by Dr. Ball in his expert report:

> First, I was asked to assess Beazer's regulatory compliance history under RCRA and Alabama's hazardous waste management program as it relates to Beazer's activities at the site under RCRA. Second, I was asked to address generally whether or not Beazer's costs are necessary costs of response incurred consistent with the National Contingency Plan, and to respond in particular to conclusions and opinions contained in Beazer's expert report on these issues. Third, I was asked to evaluate whether the volumetric approach to allocation advanced by Beazer through its expert report, which is based on known or assumed production, is appropriate. If it is not, I was asked to present an appropriate method for incorporating relevant volume considerations as one factor in an

> equitable allocation. I was not asked to derive an overall allocation for the site that takes into consideration all of the possible equitable factors that may form the basis for an allocation.

(Docket #218 at 2-3).

Dr. Ball opines in his report that there are several types of environmental investigation expenses incurred by Beazer at the Woodward plant, and that there will be several types of remediation expenses, which are not recoverable CERCLA costs. Thus, in his view, these costs should not be included in any equitable allocation in this case (Docket #218 at 7). He further states that Beazer's cost allocation approach is too heavily dependent upon "assumed production volumes and estimated waste disposals" (*Id.*).

Dr. Ball makes the case that Beazer, through its choices in the manner it operated the Woodward plant has incurred costs under RCRA which would not have been ordered in a CERCLA clean-up. His argument proceeds as follows: (1) RCRA became effective on November 18, 1980; (2) Beazer could have avoided the application of RCRA regulations by ensuring that no RCRA "unit," i.e., no Solid Waste Management Unit (SWMU) identified as triggering RCRA scrutiny, was in operation after the Act's effective date[12]; (3) Beazer also opened other waste disposal or handling "units" after the effective date of RCRA which, due to the continuing use of SWMU 2, were also automatically subject to RCRA; (4) at least some portion of the costs incurred by Beazer are

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[12] Dr. Ball states that other companies made such decisions for the purpose of avoiding RCRA's requirements. Beazer, however, continued to use SWMU2 (the unlined KO87 waste pile) after the effective date of RCRA, thereby triggering RCRA's requirements.

related to the proper closure and post-closure care of Beazer's RCRA units which are unrelated to Mead's operation of the facility; (5) Beazer failed to timely close the SWMU 2 after RCRA's effective date, thereby encountering more requirements of RCRA and increased costs which would not have been incurred otherwise;(6) had Beazer not intentionally encountered RCRA programmatic requirements through its continued use of SWMU 2, or had Beazer timely complied with RCRA requirements, any clean-up at the site would have been accomplished under CERCLA or applicable Alabama law; (7) RCRA clean-ups are generally more extensive and less "flexible" than CERCLA or state-led clean-ups (*Id.*, at. 16-18).

Dr. Ball then discussed the requirements of CERCLA, and the requirement that for response costs to be recoverable, they must be in response to a threat to human health or the environment. He concludes that only those actions which would have been taken under a "properly conducted CERCLA Investigation" are necessary and, hence, recoverable costs of response (*Id.*, at 20).

Dr. Ball also criticizes the expert reports submitted by Dr. Robert Harris and Jay Vandeven on the issue of cost recoverability. Dr. Ball finds their analysis flawed since, in his view, it relies upon an implicit assumption that a RCRA Facility Investigation (RFI) is the functional equivalent of a CERCLA Remedial Investigation (RI). This, in Dr. Ball's view, is error (*Id.*, at 21). Dr. Ball explains the difference between the two programs in terms of the aim of each, and opines:

> The RCRA investigative process (as defined under HSWA) has elements which are loosely analogous to the CERCLA investigative process (as defined in the NCP). Significantly, however, the underlying requirements are dissimilar. The goal of a CERCLA response action is to address those releases of hazardous substances which create a threat to human health or the environment. In contrast, the goal of the RCRA corrective action process is to address the presence of hazardous wastes or hazardous constituents which may have been released from a solid waste management unit, irrespective of whether an actual threat exists.

(*Id.*, at 22-23).

Dr. Ball notes that groundwater monitoring associated with three SWMUs identified as RCRA units is a RCRA programmatic requirement which would have no independent basis in a CERCLA action. He reaches a similar conclusion with respect to programmatic requirements flowing from the Clean Air Act or OSHA, which would exist regardless of the need for a corrective action under RCRA or CERCLA.

Dr. Ball argues that, even where some of the testing done by Beazer pursuant to RCRA would have been done pursuant to CERCLA to establish the nature and extent of a release or potential release, there has been some "overtesting" by Beazer in that Beazer did more testing under RCRA than would have been necessary under CERCLA.

Dr. Ball identifies "oversampling" which he says has occurred at the site:

> Beazer's Phase II soil boring 228 was placed between Phase I borings 090 and 145, even though the Phase I results from these locations were of the same order of magnitude. The Phase II soil sample was not necessary to select between remedial alternatives needed to mitigate any risk posed by the contamination.

(*Id.*, at 30). He also criticizes the manner in which the sampling was accomplished. He states that "some" of the sampling from Phase I needed to be redone due to quality control problems:

> It appears that much, if not all, of the Phase I re-sampling performed in early 1996 was required due to the [quality control] problems associated with the initial Phase I results. However, the sampling program under Phase II was developed prior to the Phase I re-sampling. In fact, the Phase II sampling program was conducted at the same time as the Phase I re-sampling. Even if all of the Phase I sampling was necessary, and performed consistent with the NCP, Phase II was clearly not designed to supplement Phase I since the latter results were not completely under understood until after Phase II was completed. A properly conducted Phase II would have taken into account the final results of Phase I. Thus, Phase I re-sampling was not necessary and consistent with the NCP, and the entire scope of Phase II is suspect.

(*Id.*, at 31). The court takes Mr. Ball to mean that whatever limited re-sampling was done somehow invalidates all of the initial Phase I results. Or, at the least, that no proper Phase II could have been planned and coordinated absent all of the Phase I samples. This is simply not necessarily the case. It may be that the Phase I re-sampling was necessary to

complete the testing, but that the limited number of samples which needed to be repeated were not sufficient to prevent Phase II planning. Mr. Ball provides no specific analysis of the re-sampling, nor does he identify any modification that that re-sampling would or should have made in the Phase II sampling. In short, he has not shown any reason to conclude that the Phase II sampling was "suspect" in any fashion.

Dr. Ball also asserts that the manner in which certain testing would have occurred "should" have been determined only after the creation of a conceptual site model. This is, in the court's view, the type of difference in professional opinion referred to by the USEPA in guidance documents, and which is to be expected from site to site. Two professionals might easily conduct remediation under CERCLA in the fashion done by Beazer, and in the fashion recommended by Dr. Ball, and each could be consistent with the NCP. In short, what Dr. Ball has identified are simply differences in approach to the same problem, but within the same general guidelines.

Dr. Ball then explains the manner in which he approached his post hoc assessment of the site pursuant to CERCLA. He relies upon information available prior to the date the RFI was done (*Id.*, at 34-35, note 7). Tellingly, though, he frames the matter as follows:

> My *post hoc* conceptual site model includes nine operable units that could reasonably be defined under CERCLA.

(*Id.*, at 36). Indeed, there is little question that the site "could reasonably" have been investigated differently. This proves nothing, however, concerning consistency with the NCP.

Dr. Ball ends this portion of his report with the following summation:

> In summary, my scoping process under CERCLA has identified nine operable units. In the CERCLA RI/FS process, these operable units would next be assessed to determine the presence or data gaps that must be filled to allow selection of an appropriate remedy for each operable unit. The CERCLA investigation would then proceed to fill in those data gaps, and only those data gaps. Thus, Beazer's investigative costs to date are necessary and consistent with the NCP only to the extent they are called for by the CERCLA conceptual site model and nine operable units. Once Beazer identifies those costs it actually seeks to recover, I expect to be able to delineate the portion of those costs which are not called for by the conceptual site model and the nine operable units and, therefore, are not necessary and consistent with the NCP.

(*Id.*, at 38). Again, however, Dr. Ball assumes that his site model is the only manner in which the site could have been addressed under CERCLA. As noted above, this opinion leaves no room for the accepted notion that professional judgment might vary from site to site. Indeed, his model must be rejected by the court.

Dr. Ball's volumetric approach is set forth in approximately 20 pages of his expert report (*Id.*, at 39-58). First, he finds the approach of Dr. Rausser flawed in two key respects: (1) Dr. Rausser made a fundamental assumption that all waste streams cause equal risk to human health and the environment; and (2) Dr. Rausser makes an allocation prior to determining which areas of the site, and which associated wastes, will require remediation. Dr. Ball asserts that the

nature and extent of contamination from each distinct waste stream should be analyzed, and that those with greater risk should be given greater weight. Further, no allocation can be made, in Dr. Bell's opinion, until the specific response necessary for different Operable Units is determined. In other words, if extensive remediation is necessary for one waste stream, and the waste at issue may be attributable to one party more than another, this determination is essential to any allocation (*id.*, at 39-40).

Dr. Ball first asserts that SWMU 4 and SWMU 5, also referred to as landfills 1 and 2, pose no threat to human health or the environment, and that the investigation of these sites should not be included in the recoverable response costs (*Id.*, at 41). If they are so included, they should be allocated to Beazer as the current owner of the facility.

Dr. Ball attempted to determine from historical records and testing data which party contributed which wastes to which operable unit. He then classified the contributions among the three PRPs as "major, "minor," "de minimis," or "no contribution." He assigned "minor" contributors a %10 allocation, regardless of actual volume, and "de minimis" contributors a 5% share, again regardless of actual volume, and the "major contributor" the remainder of the allocation for each unit. Hearing exhibit D-41 is a chart in which Dr. Ball sets forth his proposed allocation. He does so in terms of Operable Units. Some operable units are further broken down into SWMUs and AOCs. A copy of the chart is attached as Report Exhibit A. The actual volumes assigned will be noted during the summary of Dr. Ball's testimony at the hearing in this matter.

Dr. Ball testified during the hearing in this case. A protracted voir dire was conducted (Docket #276, at 2-92).

Mr. Ball was offered as an expert in the following areas:

(1) RCRA, RCRA regulations and their application;

(2) CERCLA and its application, including investigations and remediation and the allocation of response costs;

(3) The Clean Water Act, its regulations and their application;

(4) fate and transport;

(5) risk assessments;

(6) environmental contamination at coke plants;

(7) Alabama regulations concerning solid and hazardous waste.

(*Id.*, at 41). The court found Dr. Ball qualified in all of the proposed areas, but did not permit him to testify concerning the Clean Water Act because his report contains no opinion on that legislation (*Id.*, at 87-91).

Dr. Ball testified first imposed by RCRA on coke producers associated with coking operations concerning the obligations. Two specific types of waste were identified in RCRA regulations: K060 (ammonia still lime sludge) and K087 (coal tar sludge) (*Id.*, at 94; 40 C.F.R. §261). By May, 1980, parties were required to declare their intent concerning any waste management units at their facilities, and by November, 1980, parties were required to file a "Part A" application, which was the first of a two-stage permitting process (*Id.*, at 94-96). Woodward filed its Part A application, listing K060 and K087 wastes being generated at the

Woodward Coke Plant (Defendant's Exhibit 133; Plaintiff's Exhibit 346). Dr. Ball restated his opinion that Beazer could have avoided application of RCRA in 1980 (Docket #276 at 97). In his view, Beazer could have modified its waste handling procedures, or simply ceased to store certain wastes, prior to November, 1980, and would not have been required to file a Part A permit. Further, in Dr. Ball's opinion, once having filed a Part A permit, Beazer could have avoided the second stage, the Part B permit, by "closing" the three "interim status facilities" which were listed in the Part A application. This would have involved the removal of all hazardous wastes and residuals, and the implementation of a sampling program to prove that this removal had been accomplished (*Id.*, at 100).

The HSWA amendments to RCRA became effective in 1984. These amendments "instituted a corrective action requirement that . . . required facilities to investigate and clean up historical solid waste units as a condition of obtaining the [Part B] permit." (*Id.*, at 101). Upon a finding that a release of hazardous waste had occurred at a facility, the RCRA administrator could order that a corrective action take place at the facility (*Id.*). This corrective action would entail a RCRA facility assessment, which is an investigation of the potential source or sources of the release (*Id.*, at 102). Dr. Ball testified that to his understanding the HSWA amendment requirement of a facility assessment could be avoided if a party "ceased operation" as a Part A "interim" status facility, i.e., if Beazer had closed the three waste management units at the facility prior to the enactment of HSWA (*Id.*, at 103).

Dr. Ball also stated his opinion that at least a portion of Beazer's past and future costs at the site are due to RCRA programmatic requirements (*Id.*, at 111).

Dr. Rausser, in Dr. Ball's view, has failed to take into account any risk-based factors in determining responsibility (*Id.*, at 112). Indeed, he rejects a strict volumetric approach to allocation pursuant to CERCLA at the Woodward site.

Dr. Ball identified nine "operable units." The first unit is what he refers to as "Pond Sediments." These encompass what have been marked during the RCRA RFI as SWMUs 6 (Old Coal Washing Ponds) , 25 (Coal Dust Runoff Sump and Muck Ponds); 32 (Upper Impoundment or North Pond); 33 (Lower Impoundment or South Pond); and 34 (Settling Ponds) as well as AOC-E (Old Ponds) (Docket #276, at 124-125) (Report Exhibit a).

The second Operable Unit is entitled "Sludge Piles and Waste Piles, and includes SWMUs 19 (Lower Impoundment Sludge Piles) and 20 (Settling Pond Sludge Piles), and AOC-C (Waste Pile to the South of the Parking Lot) (Docket #276 at 125-26).

The Third Operable Unit is labeled "Ditches and Drains" and includes SWMUs 29 (West Drainage Ditches), 30 (East Drainage Ditches) ; 35 (Underground Drains); 37 (Hot Ditch) and 39 (Wastewater Drains) (*Id.*, at 126).

Operable Unit 4, "Light Oil Recovery Area," includes AOC-D (Light Oil Recovery Area) (*Id.*, at 126-28).

Operable Unit 5, "Tar Pipeline," includes SWMUs 40 (Suspected Tar Well) and 41 (Former Tar Pipeline)(*Id.*, at 129-30).

Operable Unit 6 consists of the "Opossum Creek Sediments," and does not include any SWMUs or AOCs (*Id.*, at 130-31).

Operable Unit 7 are "Ground Water Liked to Karst Features," and, again, does not include any SWMUs or AOCs (*Id.*, at 131-32).

Operable Unit 8 is the "High Metals Area," and includes SWMU 36 (Septic Tank System) (*Id.*, at 132-34).

Operable Unit 9 is the "Surficial Soil in Production Area," which does not encompass any SWMUs or AOCs(*Id.*, at 134).

Dr. Ball did not include in his operable units either of the two landfills on the site (the landfills addressed at length by Beazer's expert Wayne Grip). Dr. Ball gave the following reasons for not including the landfills:

> When I looked at the site data, nothing suggested that these landfills were posing a significant threat.
>
> I walked around the landfills myself and looked for significant breakout of leachate or other problems associated, I looked at the drainage areas away from the landfills and didn't observe anything of significance.
>
> Finally, my understanding is that they, while I'm sure they have a variety of material, my belief is that the material [that] went into them was more inert than otherwise.
>
> So, although they represent, in Alabama, an industrial landfill that might have to be closed, I don't -- none of the data I saw suggested that they really have significant abnormal issue[s] in terms of risk.

(*Id.*, at 134-35).

Dr. Ball did not have available to him, at the time he completed his report, the RCRA Facilities Investigation or "RFI" report. He reviewed this (Plaintiff's Exhibit 1338) prior to his testimony (*Id.*, at 135-36). He believes that the primary and secondary areas of concern (AOCs) identified by the RFI "match up remarkably well" with the nine operable units he himself has identified (*Id.*, at 136).

With respect to the allocations he would make in this case, Dr. Ball testified that he assigned responsibility in most instances on the basis of his earlier-described "major/minor/de minimis/absent" method of allocation according to a party's "involvement" with the area in question. He chose this method because of the difficulty in stating with any certainty the contribution of a party to areas, like the ponds, which had been dredged at different times, thereby changing the amount of toxic wastes placed there by one or more of the parties (*Id.*, at 136-37). Dr. Ball felt that this method, which he states is normally used for situations where "four or five hundred" industrial parties have contributed to a landfill, was appropriate here because of what he termed an insufficient "accounting', of the amount of contamination contributed by each party (*Id.*, at 138-39). He did, however, use a more strict volumetric approach with respect to some areas where the information was, in his view, more complete.

Dr. Ball also assigned allocation percentages with respect to each operable unit, and with respect to each SWMU and AOC within an operable unit, separately. This permits allocation based upon costs associated only with those operable units which will actually require remediation (*Id.*, at 142).

The allocation percentages made by Dr. Ball are as follows:

Operable Unit 1 Pond Sediments	Mead	Beazer	KII
SWMU 6	95%	5%	0%
SWMU 25	33.3	33.3	33.3
SWMU 32	45	45	10
SWMU 33	45	45	10
SWMU34	10	80	10
AOC E	45	45	10
Operable Unit 2 Sludge Piles	0	100	
Operable Unit 3 Ditches & Drains	54	29	17
Operable Unit 4 Light Oil Area	0	0	100
Operable Unit 5 Tar Pipeline			
SWMU40 Suspected Tar Well	0	0	0
SWMU 41 Former Tar Pipeline	100	0	0
New Tar Pipeline	5	47.5	47.5
Operable Unit 6 Opossum Creek	--	--	--
Operable Unit 7 Ground Water	45	45	10
Operable Unit 8 High Metals Area	80	10	10
Operable Unit 9 Surficial Soil	73	17	10

(Exhibit D-139). Dr. Ball explained his reasons for the allocations made at the hearing. For example, he assigned equal shares to all three PRPs in SWMU 25, the Coal Dust Run-off Sump and Muck Ponds, because that was an area used by all three, and the sediments or wastes were routinely cleaned out of that area (*Id.*, at 144). Thus, he decided to assign responsibility on a "per capita" basis (*Id.*). With respect to the ponds, SWMUs 32 and 33, he assigned numbers based upon his conclusion that the lakes had been dredged at various times, more by Mead than by Beazer, and that there still appeared to be sludge which needed to be removed (*Id.*, at 145). He was unable to determine with any accuracy the actual contributions of the parties, so he assigned

Mead and Beazer each a "major" role, and KII a "minor" role (*Id.*).

Dr. Ball assigned responsibility for the ditches and drains area (Operable Unit 3) on the basis of years of operation. He started from 1948, which is the date of photographs showing the ditches in their present configuration (*Id.*, at 154). This is appropriate, in the witness' view, since the ditches and drains are constantly being flushed with material, and the problem accumulates relative to the time that they are used (*Id.*). The figures found on his chart, however, should, he says, be adjusted to reflect that at least some of these ditches and drains appear on a 1940 photograph (*Id.*, at 155). Dr. Ball makes no mention of any other historical data concerning the existence of ditches and drains, nor does he state why he assumes that ditches and drains in the same or similar places would not have been used at the facility much earlier than 1940. On cross-examination, he admitted that maps of the facility from as early as 1910 showed ditches and drains, but that they did not appear to be "coterminous" with the ditches and drains apparent in the 1948 photograph, or a 1940 photograph which also showed those features (*Id.*, at 156-159).

Dr. Ball did not allocate responsibility for the Opossum Creek Sediments (Operable Unit 6) because the problem appears to initiate upstream of the Coke Plant (*Id.*, at 160).

On cross-examination, Dr. Ball conceded that coking operations inherently involve the generation of hazardous wastes, and that the residues produced are of "particular concern" to regulatory agencies (*Id.*, at 179). This concern began prior to the enactment of RCRA, and involved efforts by the USEPA to develop a nation-wide data base of sites where hazardous waste disposal had occurred (*Id.*, at 181-82;

205-209). Dr. Ball also conceded that, in rendering the opinion that Beazer could have avoided the requirements of RCRA, he gave no consideration to what operational changes would have been necessary to stop producing or handling wastes in a manner requiring a RCRA Part A application (*Id.*, at 189-90). Indeed, Dr. Ball is not aware of any coke plant which ceased the triggering activities on or before the deadline of November, 1980 (*Id.*, at 198). Further, Dr. Ball conceded that with respect to much of the regulatory framework of RCRA there was, in and around RCRA's effective date, uncertainty in the industry concerning the actual requirements thereof (*Id.*, at 200-204).

Dr. Ball recognized that the RCRA investigation in this case was focused upon the entire site due to "the size of the plant, the close proximity of SWMUs and AOCs and the impossible task of defining the potential release from each individual unit . . .." (Docket #284 at 29-30). He also agreed that addressing the entire site in this fashion was a "reasonable" manner to address the Woodward site (*Id.*, at 30). He also conceded that a CERCLA investigation may or may not be similar to a RCRA investigation of a particular site and that, in this case:

> I actually believe, this is obviously speculative or hypothetical because it didn't go this way, but a PASI under CERCLA would have ended up with [Dr. Ball's proposed conceptual site model]. That is to say, with those principal and secondary areas of concern. It would not have sampled the entire site to the extent that the RFI did.

(*Id.*, at 31). Later in his testimony, Dr. Ball agreed that a RCRA investigation consistent with a PASI would be a recoverable cost (*Id.*, at 35). Indeed, "through investigations

of soil and groundwater at Super Fund sites" are "generally required." (*Id.*, at 42).

Dr. Ball has no dispute with Dr. Jones' toxicity opinions (*Id.*, at 80), and also agrees that "fingerprinting" of wastes is not possible at this site (*Id.*). Further, Dr. Ball concedes that Mr. Lasky is able to make an estimate of the wastes produced historically at the site from the production information he possessed (*Id.*, at 83-84).

When pressed about his basis in the NCP for dividing the site into nine operable units which leave much of the area surrounding the plant unaddressed, Dr. Ball repeatedly stated that, in his view, the use of operable units would facilitate the clean-up at the site, and would also be advisable since "phased analysis and response is advisable" (*Id.*, at 98-107). Dr. Ball readily conceded that another professional could disagree with him concerning the operable units he has identified, and also conceded that there would be no absolute requirement that the site be divided into operable units in order for a CERCLA response to occur (*Id.*).[13]

ENVIRON CORPORATION (Robert A. Harris, Ph.D.; and Jay Vandeven)

Dr. Harris and Mr. Vandeven are employed by Environ Corporation.[14] Environ was retained by Beazer to "examine,

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[13] Specifically, Dr. Ball stated that, in his view, "it would be hard to reconcile [a site investigation] with CERCLA without dividing it into operable units . . . but I guess I couldn't say 'must.'" (*Id.*, at 119).

[14] Dr. Harris founded Environ Corporation and is a principal thereof. He holds a Ph.D. in Environmental Sciences and

for purposes of cost recovery, the extent to which [the actions taken at the Woodward Facility] were necessary and consistent with the National Contingency Plan (NCP)." (Docket #207, Tab 1 at 1). Private party response activities are addressed in Section 300.700 of the 1990 National Contingency Plan as follows:

> Any response action carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA, will be considered "consistent with the NCP."

Even though the AOC in this case was entered pursuant to RCRA, in Environ's view this is no obstacle to finding that the actions taken pursuant to that AOC are consistent with the NCP since "the substance and specific elements of a CERCLA 106 order and the subject AOC are comparable." (Docket #207, Tab 1 at 3). The Environ report further notes that the AOC entered under RCRA requires that a Facility Investigation be conducted to determine the nature and extent of any releases of hazardous waste or hazardous constituents at or from the Facility, and that a Corrective Measures Study be conducted to identify and evaluate alternatives for corrective action necessary to prevent further releases and to

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Engineering, an M.S. in Environmental Health Engineering, and a B.S. in Civil Engineering. Dr. Harris has 25 years of experience in environmental health and engineering, including the evaluation of risks to human health and the environment with respect to a wide range of industrial and waste disposal activities (Docket #207, Tab 1). Jay Vandeven is Manager of Environ and holds and M.S. in Environmental Engineering and a B.S. in Civil Engineering. He has himself conducted RCRA facility assessments of industrial sites, and has broad experience in environmental risk assessment (*Id.*).

mitigate past releases. The AOC also states that "[t]here has been a release of hazardous wastes and/or hazardous constituents into the environment from the facility . . .." and further that "[t]he actions required by this Order are necessary to protect human health or the environment." The AOC also requires that all activities be undertaken in compliance with "applicable EPA guidelines." Environ argues that guidelines applicable to CERCLA and RCRA actions are either identical or comparable in all relevant respects.

Environ analyzed the activities undertaken at the Facility in three categories: (1) pre-RCRA Facility Assessment (RFI); (2) RFI Phase I; and (3) RFI Phase II. Pre-RFI activities at the Facility began in 1986 and included ground water monitoring and "limited soil, surface water and sediment sampling" (*Id.*, at 7). The USEPA cited the results of this testing for its conclusion that a release had occurred at the Facility. Thus, Environ concludes that the pre-RFI activities were necessary to determine if a release had occurred.

In Phase I, the nature and extent of any releases from the Facility and the resultant contamination and threat to human health and the environment are identified. These activities are listed with particularity in the Environ report and include the following: soil borings; test pits; soil sampling; monitoring well installation and ground water sampling; aquifer characterization; sludge pile investigation; surface water and sediment investigation; a preliminary ecological investigation; and a second round of groundwater sampling (*Id.*, at 9-10). These activities were initiated in February, 1992 and continued through January, 1993 (*Id.*, at 11). This work was "intended to provide the preliminary data to needed to assess the nature and extent of contamination and potential threat to human health and the environment." (*Id.*).

Phase II of the RFI began in September, 1995, after Beazer received approval of its work plan. The activities conducted pursuant to this second phase of the RFI include: preliminary planning and site reconnaissance; a dye tracer study; natural potential survey and magnetometer survey; surface water and sediment sampling; ecological and wetlands reconnaissance survey; soil boring and sampling; coke and coke fill sampling; monitoring well installation and ground water sampling; downhole geophysical surveys; aquifer pump test; and pipeline testing (*Id.*, at 13-16). These activities were all designed to "provide further data on the nature and extent of contamination, assess threats to human health or the environment, and/or provide data for the CMS [Corrective Measures Study]" (*Id.*, at 12).

A RCRAFacility Assessment (RFA) was conducted by USEPA in May, 1988. This RFA resulted in the identification of 39 Solid Waste Management Units (SWMU's). No further action was recommended with respect to 12 of these units, and further investigation and sampling was required on 23 others. The remaining three were "regulated units" under RCRA (the units which were still in use as of the effective date of the statute) and were closed in 1988. In Environ's opinion, these pre-RFI activities were consistent with the preliminary assessment and site investigation phases of a CERCLA investigation conducted pursuant to the NCP (*Id.*, at 18).

The Environ report then lists each specific action taken pursuant to the AOC and SOW issued pursuant to RCRA, and identifies a provision in the NCP with which each action is, in Environ's view, consistent (*Id.*, at 20-24). A review of the activities and the NCP (located at 40 CFR 300.430, *et. seq.*) yields evidence supporting Environ's opinion.

Mr. Vandeven also provided a rebuttal expert report responding to Dr. Ball's expert opinions (Docket #224, Tab 1). He interprets Dr. Ball's report as reaching two conclusions with which Mr. Vandeven disagrees: (1) that risk to human health and the environment are not considered by EPA in determining the scope "or implementation of a RCRA Corrective Action; and (2) that the investigation and remediation of a facility would be drastically different had it proceeded under CERCLA instead of RCRA (*Id.*, at 3).

Mr. Vandeven opines that, in his experience, protection of public health and the environment is the "primary objective" of both statutes, and that investigations and remediations under each statute are "substantively equivalent." Along with his experience, he points to EPA guidance documents addressing RCRA Corrective Actions which repeatedly refer to assessment of risks and threats to human health and the environment (*Id.*). Further, guidance documents for CERCLA and RCRA reference some of the same risk assessment documents (*Id.*, at 3-4).

Mr. Vandeven also states that, in his experience, the scope of the investigation and remediation under RCRA is "substantively equivalent" to actions taken under CERCLA. He points to the following passages from a September, 1996 USEPA memorandum entitled "Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities":

> Generally, cleanups under RCRA corrective action or CERCLA will substantively satisfy the requirements of both programs. . . .
>
> . . . when investigations or studies have been completed under one program, there should be no need to review or repeat those investigations or studies

> under another program. Similarly, a remedy that is acceptable under one program should be presumed to meet the standards of the other.
>
> It has been our experience that, given the level of site-specific decision-making required for cleaning up sites, differences among the implementation approaches of various remedial programs primarily reflect differences in professional judgment rather than structural inconsistencies in the programs themselves.
>
> We are committed to the principle of parity between the RCRA corrective action and CERCLA programs and to the idea that the programs should yield similar remedies in similar circumstances.

(*Id.*, at 4-5).

Dr. Ball concludes that "[h]ad Beazer ceased using any units for treating, storing and disposing hazardous waste prior to November 19, 1980, USEPA would have no jurisdiction to issue the RCRA Order." First, Mr. Vandeven points out that the amendments to RCRA under which the facility was addressed were not enacted until 1984. Further, even if Beazer had chosen to change its practices, the Facility likely would have been investigated under CERCLA, RCRA or state law in any event, since the site has a history of environmental problems, and an investigation was likely regardless of the existence of a RCRA operable unit (*Id.*, at 5-6).

Mr. Vandeven also questions the use by Mr. Ball of the concept of "Operable Units" to divide the Facility for purposes of analyzing a hypothetical CERCLA response action. He states that operable units are "discrete actions that comprise incremental steps toward a final remedy". Even

where a Facility is separated into operable units for purposes of CERCLA, a CERCLA response action would address the entire site (*Id.*, at 6).

Mr. Vandeven testified at the hearing in this matter in rebuttal. He was found qualified as an expert on the National Contingency Plan "including application of the NCP to actions conducted pursuant to RCRA, CERCLA and various state . . . hazardous waste and solid hazardous waste management programs." (Docket #295 at 211). He testified concerning each step in both the CERCLA and RCRA processes, and gave his opinion that each step in the former has a substantially similar step in the latter (*Id.*, at 213-215). He criticized Dr. Ball's division of the site into operable units, and Dr. Ball's statements that the pre-RFI investigation costs were not consistent with the NCP. Specifically, Mr. Vandeven testified that "you have to have a certain amount of data before you could divide the site . . ..That kind of minimum level of data is usually not available until the RI is complete or substantially complete." (*Id.*, at 218-219). Thus, in Mr. Vandeven's view, Dr. Ball's conclusion regarding the necessity of pre-RFI investigation costs is flawed. Further, with respect to Dr. Ball's "operable unit" division of the site, Mr. Vandeven testified that the remainder of the site would, in any event, still need to be addressed. "The NCP is quite clear the definition of site encompasses all areas of contamination, not little pieces with noncontiguous areas eliminated." (*Id.*, at 220).

Frank A. Jones, Ph.D., DABT

Dr. Jones has a doctorate in environmental toxicology and has prepared over 300 risk assessments at sites in 32 different states (Docket #207, Tab 3 at 1). He is a senior consultant and head of risk services for HydroSystems Management, Inc.

Dr. Jones reviewed the RCRA risk assessment conducted at the Woodward plant, and concluded in his report that the investigation done at the site by Beazer "was sufficient to generate the data required for evaluating potential risks from current and historic waste handling practices at the site." (Docket #207, Tab 3 at 6). This information is necessary under applicable RCRA guidelines to assess the risk and to formulate appropriate remediation (*Id.*, at 3-5).

Dr. Jones did not analyze the effect of generally improving waste management practices over the years on the allocation between the PRPs. He did, however, described the wastes generated pre-1974 and post-1974 in terms of those wastes which were unique to each period. Thus, he compared the relative toxicity of acid sludge, crude heavy solvent residues and caustic soda sludge (pre-1974) with waste water treatment plant solids (post-1974). He found that the wastes peculiar to the pre-1974 era were generally more toxic than the waste peculiar to the post-1974 era. Other than these wastes unique to each period, all other wastes generated at the plant were generated both before and after 1974. Dr. Jones opined that waste management improved in the period 1974-1994:

> . . . it is well known that control of emissions, especially air emissions and the treatment of wastewaters, and improved waste management practices have occurred in the U.S. coking industry. The effects of this evolution in the industry has been an increase in the level of waste containment and waste treatment, especially within the last two decades. These improvements in operations and waste management in the U.S. coking industry resulted in lowering the potential for uncontrolled releases of chemicals to the surrounding environment, and

> decreased the volume and toxicity of wastes that were generated.

(*Id.*, at 7). Dr. Jones concluded, therefore, that the "it is likely that relative toxicities of wastes generated during the post-1974 operations were lower, but definitely no higher than, the toxicity of wastes generated prior to 1974." (*Id.*, at 9).

Dr. Jones also filed a rebuttal report to Dr. Ball's report (Docket #224, Tab 3). Dr. Jones disputes the conclusion that CERCLA and RCRA have basically different goals. Dr. Ball asserted that the crux of the distinction between the two programs is that CERCLA is addressed only to waste releases that "create a threat to human health or the environment" while RCRA may apply to particular waste irrespective of any danger to humans or the environment. Dr. Jones states the goals of the two programs in general terms as follows:

> A goal of the RCRA program is to manage the storage, transport, and disposal of hazardous wastes so that they do not pose a risk to human health or the environment. The management and administrative aspects of the RCRA program are not an end to themselves, but are a means of protecting human health and the environment. The common goal of both the RCRA and CERCLA programs is to reduce or eliminate threats to human health and the environment.

(*Id.*, at 1). Dr. Jones notes that there are risk-based criteria utilized in RCRA assessments, and, in fact, that there is "increasing application of risk assessment methods to the RCRA program. . .." (*Id.*). He concludes that "[t]here is no distinction between the two programs in the evaluation of potential risks or the development of cleanup goals that are

protective of human health and the environment. Risk-based goals developed under a RCRA corrective action investigation would be equally acceptable under the CERCLA program." (*Id.*, at 2). In this specific case, the "RCRA corrective action program, under which the Woodward Coke Plant is currently being investigated, has very similar investigation and remediation guidelines and goals as the CERCLA program." Dr. Jones cites to a USEPA memorandum entitled *Coordination between RCRA Corrective Action and Closure and CERCLA Site Activities* (USEPA, 1996), in which parties are encouraged "to consider risk-based approaches when developing cleanup levels for RCRA regulated units and [to] give consideration to levels set by state/tribal programs which use risk-based approaches." The memorandum goes on to note that "a remedy that is acceptable under one program should be presumed to meet the standards of the other." (*Id.*).

Dr. Jones also argues that the "conceptual site model" stressed by Dr. Ball "does not exist in the risk assessment guidelines" issued by the USEPA (*Id.*, at 5). Instead, a "conceptual site model" is simply a "good model of potential exposure pathways at the site," and is in no way a concrete, limiting document in the sense that only items displayed may be appropriately considered CERCLA response costs.

Dr. Jones then asserts that Dr. Ball's division of the site into nine operable units is not only inappropriate, but would not be permitted under CERCLA (*Id.*). There is no indication in Dr. Ball's report, says Dr. Jones, of the risk-based reasons for separating the site into nine units, and for further separating those units with respect to potential exposure pathways (*Id.*, at 6). Dr. Jones dismisses the division of the site as proposed by Dr. Ball as follows:

> Under the CERCLA program, the entire site is potentially subject to investigation. A CERCLA site is not subdivided into operable units unless the regulatory agency (federal or state) can be convinced that subdividing the site will expedite the investigation or remediation. Even if a CERCLA site is subdivided, the process is not permitted to arbitrarily exclude areas from evaluation. . . . In the absence of a rational justification, the site would not be subdivided under the CERCLA program.

(*Id.*).

The court is convinced that Dr. Jones has the better of the argument in this respect at least: What Dr. Ball proposes may be one way of presenting the site to regulatory agencies. Further, that way might cost less and might avoid some of the expenses actually incurred. This does not, however, mean that the method pursued by Beazer at the urging of the USEPA contains response activities which are inconsistent with the NCP. Indeed, all that Dr. Ball's exercise has established is that USEPA *may* have been convinced to take a less expensive tack at the Woodward site. This, however, is not sufficient to establish that any activity taken there, including activity addressed expressly to RCRA units, was in any way inconsistent with the NCP.

Dr. Jones also opines that the Ball report is inconsistent in that four factors are set forth to be considered in allocating response costs, but that the report then ignores those factors which include any differences in relative toxicity between pre-1974 and post-1974 wastes or in the risks associated with the practices engaged in during the relevant time periods (*Id.*, at 6-7).

Dr. Jones testified at the hearing in this matter, and was found qualified to testify as an expert "upon all aspects of environmental toxicology and risk assessment including the evaluation of the behavior and toxicity of chemicals released to [the] environment and all aspects of risk assessment and evaluation including human health risk assessment and ecological risk assessment." (Docket #292 at 23). Dr. Jones was not asked to testify at the hearing about consideration of risk in the RFI performed at Woodward (*Id.*, at 24-25). Instead, he testified concerning his opinion concerning the relative toxicity of the wastes produced at Woodward over time.

Dr. Jones testified that he relied upon the information gathered by Mr. Lasky concerning the waste streams produced at the plant (*Id.*, at 26-27). In doing so, he determined that it was not possible to distinguish between the wastes produced prior to 1974, and those produced after 1974, i.e., "[t]hat, essentially, the wastes generated in the coking operations are not unique to either the pre-1974 or post-1974 operations." (*Id.*, at 28). There was no difference in toxicity between the wastes produced in those "two periods (*Id.*, at 32). Thus, "fingerprinting" or tracing of the wastes on site to one period or the other would not be a useful tool in determining the source of the on-site contamination (*Id.*, at 30).

Dr. Jones was able to determine, however, that the "acute toxicity"[15] of the pre-1974 waste was higher than that of the post-1974 waste (*Id.*, at 37-38). He repeated his conclusion from his report that the wastes ultimately released to the environment post-1974 were no more toxic than those released to the environment prior to 1974, and were likely less toxic (*Id.*, at 39). Dr. Jones was called by Beazer in rebuttal, and commented upon Dr. Ball's testimony (Docket #296 at 2-28). Dr. Jones testified that the nine operable units identified by Dr. Ball "cannot be identified based on just an evaluation of risk." (*Id.*, at 3). Specifically, Dr. Jones' criticism is that:

> [Dr. Ball] has identified nine operable units which were evaluated based on comparison to a simple screening level risk approach. And there is no distinction made between the type of exposure pathways or the type of receptor or risk levels that were used in the evaluation. Therefore, there was no risk distinguishment between the nine operable units.
>
> At most, Dr. Ball might have identified these as units that he has identified a risk versus the remainder of the site which he had purported he identified no risk.

(*Id.*, at 3-4). Dr. Jones goes on to take the position that Dr. Ball used the wrong screening level for the risk factor (*Id.*, at 4). It would have been more appropriate, in Dr. Jones opinion, to use a more conservative risk screening level (*id.*, at 5).

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[15] "Acute toxicity" refers to the toxicity of a chemical when measured in terms of the danger caused by exposure to it for a period of ninety days (*Id.*, at 39).

Dr. Ball also considers only one type of potential exposure, that being the industrial worker. Dr. Jones believes that other exposure pathways and receptors should have been considered, such as off-site migration and trespassers (*Id.*, at 5). Further, Dr. Ball does not distinguish between risk factors for one type of industrial worker at one portion of the plant, with another worker at another part of the site (*Id.*). This prevents Dr. Ball from distinguishing between various areas of the site on the basis of risk (*Id.*, at 5-6).

Finally, and most notably in this case, USEPA in the region which includes Alabama has required a consideration of possible residential exposure even for an historically industrial site (*Id.*, at 7-8). Dr. Ball did not consider such exposure in dividing the site. It would also be necessary, in Dr. Jones' view, to consider the risk to ecological receptors, a process Dr. Ball did not employ (*Id.*, at 11).

Dr. Jones concluded that Dr. Ball had no basis for eliminating from consideration for remediation the areas of the plant not included with his nine operable units (*Id.*, at 15). He also concluded that Dr. Ball did not utilize risk-based factors to reach a volumetric allocation, since he did not attempt to distinguish between pre-1974 and post-1974 toxicity levels and the associated differences in risk (*Id.*, at 16-17).

51. Dr. Ball's methodology for allocation does not take into account environmental improvements in plant operations, such as the installation of the waste water treatment plant, or the decrease in toxicity of various plant waste streams (*Id.*, at 162-63, 169-70).

52. Dr. Ball's testimony concerning Beazer's ability to avoid RCRA regulations and, in effect, to avoid

environmental investigation and remediation at the Woodward Site is, at best, hypothetical. The court finds that Beazer would not have "avoided" any significant environmental liability by closing the RCRA units prior to 1980 or 1984, as proposed by Dr. Ball.

53. There is no evidence that Beazer intentionally encountered more intensive environmental regulation than necessary at the site through its actions. Indeed, such a finding is contradicted by the record, and would have been against Beazer's business interests.

54. Dr. Ball's criticisms of the manner in which the site was addressed under RCRA do not suffice to establish that any of the actions taken are inconsistent with the National Contingency Plan. The manner in which a site is addressed under RCRA or CERCLA differs from site to site, and a certain amount of professional style (for lack of a better word) or judgment is inherent in the system. Dr. Ball has established only that he would have conducted the site inspection and remediation differently: he has not established that anything actually done at the site was inconsistent with the NCP.

55. Dr. Ball's allocation numbers are not based upon a sufficient review of the history of the site, nor do they encompass the entire site.

Lester B. Lave, Ph.D.

Dr. Lave is a professor at Carnegie Mellon University who has done "extensive research and teaching in the economics of industrial organization" and "the economics of the environment." (Docket #216, Exhibit C at 1). At Mead's behest, Dr. Lave studied the effect of environmental regulations on the United States coke industry, and was asked

specifically to comment upon "the way in which environmental laws affected the profitability of the Woodward Coke facility and the impact that this should have on the equitable allocation issue in this case." (*Id.*). The conclusions which Dr. Lave reaches in his expert report are summarized therein as follows:

> KII profits from this coke plant have been increased by increasingly stringent environmental laws. These profits are expected to increase rapidly in the next several years due to decreasing domestic capacity to produce coke, resulting in sharply increased prices. These additional profits are due to environmental regulations that reasonably could not have been anticipated at the time Mead sold the facility to Koppers. Similarly, the environmental liabilities associated with CERCLA/RCRA are ex post facto and could not reasonably have been anticipated at the time of the sale. Mead will not share in the windfall profits going to Koppers/Beazer/KII. In my judgment, the unanticipated profits should be used to pay a large part of the unanticipated environmental liabilities.

(*Id.*)

Dr. Lave testified at the hearing in this matter as an expert in "the areas of economics, micro economics, applied micro economics, the economics of environmental regulation, the economics of the . . . energy industry, . . . the economics of the coke and steel industry, environmental policy analysis, and industrial organization." (Docket #294 at 104). Dr. Lave visited the Woodward facility prior to preparing his expert report. He also visited several other coke making facilities, and had viewed more by video during various studies he undertook to perform over the years which relate to the steel

industry (*Id.*, at 85-86, 105-106). Dr. Lave reviewed many of the documents produced in this case concerning the Woodward site, as well as "standard literature on the coal and coke industries" and "a series of reports done by Government agencies and consulting companies [concerning] the coke industry." (*Id.*, at 107). Lastly, Dr, Lave spoke with several colleagues at Carnegie Mellon University, as well as coke industry consultants (*Id.*, at 108-110).

There are three conclusions expressed at trial by Dr. Lave which are relevant:

> My examination tells me that the price of coke is likely to rise substantially over the next one to ten years, from current levels to levels of approximately $130 to $160 per ton. As the price rises, the profitability of coke companies are going -- is going to rise very substantially, because the costs of compliance for these companies will be considerably less than the price increase, at least for those coke companies that stay in business; and then my third conclusion is that the price increases and profitability increases are largely due to environmental regulation.

(*Id.*, at 110). In reaching these conclusions, Dr. Lave took into account all types of environmental regulations, and not only air pollution regulations (*Id.*). Dr. Lave also corrected a typographical error in his expert report, and noted that he intended to conclude not that KII's past profits had been "high," but instead that whatever those profits were, they were higher than they would have been absent environmental regulation (*Id.*, at 111). He did not find the actual profits earned by KII to be relevant to his conclusions (*Id.*).

Dr. Lave also corrected a more substantial error in his earlier report. In his initial report, Dr. Lave calculated the "additional revenue" to KII as a result of price increases caused by environmental regulation, but did not subtract from that amount the cost of complying with environmental regulations. Thus, the initial report "overstated what would be the additional profit to KII from these price increases." (*Id.*, at 112).

The opinion rendered by Dr. Lave is premised upon some assumptions which he identified as being: (1) that the age of coke ovens in the United States is advanced, and many of these will close down in the next one to ten years; (2) that these closures will be in response to increased costs associated with environmental regulation; (3) this lack of domestic coke production capacity will drive the price of coke up; (4) there is likely to be a large shortage of coke in the rest of the world as a whole; (5) this lack of production will have to be made up by rebuilding existing plants, or building new plants on green field sites, each of which is an expensive proposition which, again, will drive the price of coke up; (6) KII's ovens at Woodward are "relatively new" and places KII "in a good position to be able to comply with environmental regulations." This, in turn, would permit KII to profit from the combination of a downturn in coke production capacity, while not suffering from the burden of environmental regulation as much as competitors will have done. (*Id.*, at 113-14).

The testimony of other witnesses supports Dr. Lave's conclusions concerning a forecast shortfall of domestic coke, and an accompanying rise in the price of coke. For example, Donald Sweet, vice-president of KII and head of KII's coke division, testified at deposition in March, 1996, that KII anticipated "increased profitability" in the domestic coke market for the "foreseeable future." (Sweet Deposition at 72).

This projection was based upon many of the same factors considered by Dr. Lave, including an expected decrease in production due to the discontinuation of coke production at certain domestic sites (*Id.*, at 70-72).

These are, however, predictions and are not assurances. On cross-examination, Dr. Lave conceded that the coke market was generally not profitable from 1970 through 1990 (Docket #294 at 162-63). Indeed, Dr. Lave testified that the coke industry is "cyclic" and that he would expect fluctuation in prices (*Id.*, at 165). At deposition, Dr. Lave testified that, from 1989 until the mid-1990's, the price of coke in real dollars (i.e., adjusted for inflation) had not significantly changed (*Id.*). He further agreed that several "integrated" mills, steel mills which make their own coke, had shut down their coke producing facilities not solely due to environmental concerns, but because the price of coke on the open market was cheaper than that of coke they could produce themselves (Docket #295 at 20-21).

Further, Woodward Coke's profits had a "downward trend" from 1989 through 1996 (Docket #294 at 191). Woodward's actual production numbers decreased in the period from 1989 to 1996 (Exhibit D-30) from 1,182,000 tons of coal coked to 946,000 tons.

Finally, predictions made at the Gorham Conference, which was a source of information utilized by Dr. Lave in reaching his opinions, set the future price of coke at levels lower than what Dr. Lave has predicted (*Id.*, at 185-191). In fact, the A.D. Little report, which was one of the sources relied upon by Dr. Lave, used prices which included shipping and freight charges of $20 per ton. Dr. Lave's predictions were made on the basis of an undelivered ton of coke. Thus, although the A.D. Little report predicts prices in the range of

$130 to $155 per ton, as does Dr. Lave, when adjusted for the inclusion of delivery costs, the A.D. Little report would put the range at $110 to $135. In short, Dr. Lave has predicted future prices for coke which are substantially higher than any other forecast contained in the materials upon which he relied to make his prediction.

There are other variables involved as well. For example, the amount of coke needed to produce one ton of pig iron has decreased steadily since 1989, as new technologies have been applied (Docket #295, at 14-15). This includes the use of PCI, or pulverized coal injection (*Id.*).

Steven Klepper, Ph.D.

Dr. Klepper is a professor of economics and social sciences at Carnegie-Mellon University. He was retained by Beazer to "review the projections and opinions in Dr. Lave's report on the effects of environmental regulations on prices and profitability of Woodward Coke." (Docket #295 at 23-24). Dr. Klepper was found qualified as an expert and authorized to express his opinions with respect to the areas of industrial organization, econometrics and micro-economics (*Id.*, at 33).

Dr. Klepper testified to research he conducted concerning the gross profits at Woodward from 1989 through 1996. In 1989, Woodward had a gross profit of $15 million. This number decreased to $13 million in 1990 and again in 1991, $11 million in 1992, $5 million in 1923, $4 million in 1994, $7 million in 1995, and less than $1 million in 1996 (Docket #295 at 45-46). This evidence, in Dr. Klepper's view, disproves Dr. Lave's theory that the new environmental regulations, the latest of which were enacted in 1990, would result in increased profitability for the Woodward facility.

This is particularly the case with Woodward since the gross profits number utilized by Dr. Klepper does not include deductions for managerial selling and administrative costs, or for continuing investments and environmental regulation costs (*Id.*, at 46-47). He further testified that the "real price" at which Woodward is able to sell coke has not increased since 1989, and that, therefore, the price increase which might have been anticipated after the passage of the Clean Air Act Amendments in 1990 simply has not occurred (*Id.*, at 48).

Dr. Klepper also testified concerning the difference between the price predictions made by Dr. Lave and by industry analysts. He testified that he has seen no projection, other than Dr. Lave's, which places the non-delivered price of coke at between $130 and $155 dollars per ton (*Id.*, at 54-55). Further, the industry analyst reports relied upon by Dr. Lave were published in 1994 and 1995 and predicted rising coke prices in both the short and long term. At the time of the hearing in May, 1997, however, no price increase had occurred (*Id.*, at 67-68). Thus, in Dr. Klepper's view, there is reason to doubt the prediction of price increases in the coke market.

56. There is no reliable indication that coke prices, in real terms, will rise substantially in either the short term or long term.

57. To the extent that coke prices do rise, there is no indication that this will cause Woodward Coke to be any more or less profitable than "expected," i.e., there is no reliable indication that Woodward Coke will make more or less profit than may reasonably have been anticipated at any relevant time.

58. The effect of environmental regulations on the price of coke has not, historically, been to provide unanticipated profits to coke producers in general, or to Beazer in particular from the operation of the Woodward Coke Plant.

59. Mead has failed to establish by a preponderance of the evidence that KII will reap unanticipated profits due to the effects of environmental regulation upon the domestic coke market.

William L. Carr

Mr. Carr represented Mead as its counsel during the purchase of the Woodward Facility in 1968 and, later, in the negotiations leading to the sale of the Woodward facility to Beazer in 1974 (Docket #291 at 150-56).

Mr. Carr reported to Clay Davis, who was the vice president of Mead's corporate management at the time of the sale of the Woodward Facility to Beazer (*Id.*, at 155). The decision to sell the facility was based upon the "low-growth" nature of the coking business, and the substantial repair and pollution control investment necessary at the facility (*Id.*, at 156-57). Mead had considered shutting down the plant, but had an outstanding coke contract which it could not break. Thus, the decision was made to sell the plant (*Id.*, at 159-160).

Mr. Carr dealt with Mr. Ramser from Beazer in ironing out all of the details of the transaction except for the price and the decision to sell (*Id.*, at 161, 164). With respect to environmental liabilities, Mr. Carr testified that the following was Mead's intention:

> It was like any other [deal], that we would disclose the best we could with respect to what's the existing status of the situation, but Koppers would assume all responsibility for future compliance with the existing permits, any capital expenditures required by the existing permits; that any future orders or regulations would be the responsibility of Koppers; that we were walking away from the facility, we were looking for what I call a walk away deal.

(*Id.*, at 164-65). Mr. Carr believed that the result of the transaction was for Koppers to assume all future environmental liabilities at the site (*Id.*, at 166-67). Mr. Carr testified that he drafted the "as is, where is" clause of the APA (*Id.*, at 170). Mr. Carr also believed the rule of *caveat emptor* to be the law of both Ohio and Alabama at the time of the agreement (*Id.*, at 176). The only express warranties made by Mead had no relationship to environmental liabilities (*Id.*, at 177-78).

On cross-examination, Mr. Carr conceded that there may be some ambiguity concerning the meaning of the "as is" clause (*Id.*, at 196). Specifically, he agreed that one could read the clause as applying to plant machinery, and not to the entire site. However, he considered the phrase "such assets" used in the "as is" clause to refer to either the coke plant or the machinery, and Mr. Ramser did not voice any contrary view (*Id.*, at 212).

John Robert Fleenor, Esquire

Mr. Fleenor is an attorney who has practiced commercial and industrial real estate law in Alabama since 1957 (Docket #216, Tab 1 at 1). He was retained by Mead to offer an opinion upon the state of Alabama law at the time of the 1974

APA (*Id.*). In his view, the inclusion of the "as is, where is" clause was not necessary since *caveat emptor* was already the applicable doctrine in Alabama. The inclusion of that clause, however, made explicit that which was already implicit, "the intention of the parties that the real property was sold in its existing as is condition without any representation or warranty as to condition or obligation to repair or restore on the part of the seller." *Id.*, at 2).

Mr. Fleenor was called to testify at the hearing in this matter, and was found qualified to testify as an expert in the area of "the drafting and negotiation of commercial real estate contracts and related documents and the custom and usage of as is clauses in real estate documentation." (Docket #292 at 65). He repeated the opinion set forth in his report.

On cross-examination, Mr. Fleenor testified that although "as is" clauses were rare with respect to real estate transactions, they were not unusual with respect to the sale of equipment and machinery (*Id.*, at 72).

60. The APA does not unambiguously provide for Beazer to assume all environmental liabilities at the Woodward Site.

61. The APA does, however, specifically provide that Beazer shall assume and agree to perform:

> Obligations of the Coke Plant to comply from and after the Closing Date with all of the terms and conditions of any NPDES permit issued by the United States Environmental Protection Agency or the then permitting authority, any permit or order issued by the Alabama Water improvement Commissions and the Alabama Air Pollution Control Commission of the State of Alabama or any successor authority, any

> license, permit or order issued by the Jefferson County Department of Health, and or any other wastewater or runoff water discharge permit, license or order, air pollution permit,, license or order, solid waste disposal permit, license or order, hereafter issued by the United States Environmental Protection Agency and/or by the State of Alabama and/or any of its political subdivisions, all in accordance with applications now pending and listed on Exhibit F hereto.

(APA, Paragraph 4(c).

62. Mead sought, and believed it had obtained, a "walk-away" deal whereby it would not be liable for any future expenses at the site of any kind.

63. The parties did not foresee the enactment of stringent environmental regulations in the form of RCRA and CERCLA.

64. Mead made no warranty concerning the environmental condition of the facility.

65. Reasonable parties negotiating the sale of an industrial site in Alabama in 1974 would expect that the seller would not be held liable for any future environmental costs.

66. The parties in fact intended that Mead be able to "walk away" from the site, i.e., that Mead would not indemnify Beazer for any future costs at the site for any reason, including environmental response costs.

Frank Welch

Mr. Welch has worked for Koppers, and then ICF Kaiser Engineers, since 1961 (Docket #292 at 100-01). In the years prior to 1974, he spent virtually all of his time working in coke plants (*Id.*, at 103). Mr. Welch did a full inspection of the coke batteries at Woodward in the summer of 1974 (*Id.*, at 104-05). He spent 4 to 5 weeks accomplishing this task (*Id.*, at 106). Carl Lasky and Arnold Peterson were also on site from Koppers at that time (*Id.*, at 107). Mead employees provided an "extremely high" level of cooperation during his inspection (*Id.*, at 110).

67. Beazer was in at least as good a position as was Mead, and was probably in a more informed position, to assess the potential environmental problems at the site at the time of the 1974 sale.

68. Beazer performed a full inspection of the Woodward Plant prior to its purchase, and was well aware of the environmental condition of the site.

Steven V. Graham, CRE

Mr. Graham is a real estate consultant, broker and appraiser in the Birmingham, Alabama area. He was retained by Mead to give an evaluation of the value of the Woodward site, particularly in light of the contamination thereon (Docket #216, Tab 2 at 2). He concluded that, based upon a projection of millions of dollars of remediation needed, the property has a negative present value. If, however, the site were to remediated to the satisfaction of federal and state agencies, it would again have a positive value (*Id.*, at 3).

Mr. Graham testified at the hearing and was found qualified as an expert in the "valuation of commercial and industrial real estate in general and of commercial and industrial real estate subject to environmental contamination in particular, and with respect to the impact of contamination on the marketability of commercial and industrial property and the marketability of the Woodward Coke plant [property] in particular." (Docket #294 at 14). Mr. Graham repeated his conclusions from his report, and noted that the largest drawback from a marketability standpoint would be the uncertainty with respect to the contamination (*Id.*, at 15-16).

On cross-examination, Mr. Graham conceded that he has never marketed a coke plant (*id.*, at 24). He also conceded that he did not consider the existing indemnity agreement which goes along with the property (*Id.*, at 26). He also found the valuation of the property done by Beazer expert Norman Pless, Jr., MAI, to be reasonable (*Id.*, at 31).[16]

69. The present value of the land at the Woodward Plant is not significantly greater than it was at the time of the APA in 1974. In fact, in real dollars, the value of the land has not increased at all, and may well have decreased.

70. After the completion of the environmental remediation at the site, KII will own a property which has a greater value than it has prior to remediation.

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[16] Mr. Pless has filed an expert report in which he concludes that the present value (in 1996) of the Woodward site, land only, not including any of the improvements thereon, is $1,360,000 (Docket #207, Tab 4 at 4).

3. The parties' proposals concerning equitable allocation.

A. Beazer's proposed allocation.

Beazer asserts that the "Gore factors" are the only appropriate equitable allocation factors to be considered in this case. Of these, Beazer asserts, mirroring the testimony of its expert Dr. Rausser, that volume is the controlling consideration. The remaining factors are either neutral, or would weigh slightly in Beazer's favor. Hence, in Beazer's view, the volumetric calculations made by Dr. Rausser premised upon Mr. Lasky's work are controlling. Thus, Mead should be allocated 90% of the response costs, and Beazer 10%. KII should not, in Beazer's view, be allocated any of the response costs due to the existence of the indemnification agreement (Docket #247 at 28-30).

B. Mead's view.

Mead also references the Gore factors, but notes that they are not an exhaustive list of appropriate considerations. Mead presents a list of eight additional considerations it deems relevant:

1. Beazer's own actions triggered RCRA corrective action obligations.

2. Some response costs satisfy Beazer and KII's other programmatic requirements.

3. Beazer and KII have a history of RCRA delay and noncompliance.

4. Only some on-site disposals cause CERCLA response COSTS to be incurred.

5. Cleanup will benefit Beazer and KII as current property owners.

6. KII will earn future profits from environmental regulation.

7. Beazer is historically linked to the Coke Plant (and thus had knowledge of what it was purchasing).

8. Beazer contractually accepted responsibility for environmental conditions.

Addressing the last consideration first, Mead asserts that the APA and the facts surrounding the sale of the Woodward Plant to Beazer in 1974 should be considered. The assignment of liabilities for ongoing environmental responsibilities, although not sufficient to shift liability as a matter of law, may shift a significant portion, if not all, of the liability as a matter of equity. Mead asserts that the "as is" clause of the contract and the doctrine of *caveat emptor* also work in this same fashion and counsel in favor of the bulk, if not all, of Mead's liability being transferred to Beazer.

The seventh proposed consideration is also related to the concept of Beazer's knowledge at the time of the APA. Mead points to Beazer's historic links to the site both through the Tar Plant, and through Beazer's construction of various improvements to the site during the course of the Plant's operation. This, in Mead's view, may be considered as a factor in assessing the "pre-purchase knowledge" of Beazer and, hence, the reasonableness of assigning Beazer a higher allocation than would be the case through simple volumetric calculations.

The remaining considerations are, in the court's view, self-explanatory.

Mead asserts that the allocation should be 15% for its share, 70% for Beazer's share, and 15% to KII (Docket #260 at ¶70).

4. Proposed conclusions of law.

1. This Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1331(a), due to the presence of a federal question arising from §113 of CERCLA, 42 U.S.C. §9613(a).

2. Venue is proper pursuant to 28 U.S.C. §1391 and 42 U.S.C. §9613.

3. There was a release of a hazardous substance at the Woodward Coke Plant site as defined by CERCLA, 42 U.S.C. §9601(14) and (22). CERCLA defines a "release" as any spilling, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment.

4. The Woodward Coke Plant site is a "facility" as that term is defined by CERCLA, 42 U.S.C. §9601(9). A "facility" is defined as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located." *Id.*

5. The release and threatened release of hazardous substances into the environment has caused Beazer to incur response costs at the Woodward Coke Plant site necessary and consistent with the NCP.

6. Beazer is a responsible person, as defined by CERCLA, 42 U.S.C. §9607(a) (2), as it was the owner and operator of the Woodward Coke Plant site at the time that hazardous substances were disposed of on site.

7. KII is a responsible person, as defined by CERCLA, 42 U.S.C. §9607(a) (1), since it is the present owner and operator of a CERCLA facility.

8. Mead is a responsible person, as defined by CERCLA, 42 U.S.C. §9607(a)(2), as it was the owner and operator of the Woodward Coke Plant site at the time that hazardous substances were disposed of on site.

9. Because all parties to this action are responsible parties as defined by CERCLA, this Court must allocate response costs associated with the site among the responsible parties. 42 U.S.C. §9613(f).

10. The Court must exercise its discretion in making an equitable allocation of response costs, "using such equitable factors as the court determines are appropriate." 42 U.S.C. §9613(f) (1); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

11. Among the factors which may be considered by the court in apportioning response costs are: (1) the amount or volume of the hazardous substance involved; (2) the degree of toxicity of the substance; (3) the degree of involvement by the parties in generation, transportation, storage or disposal of the hazardous substance; (4) the degree of care exercised by the parties with respect to the substance involved; and (5) the degree of cooperation by the parties with federal, state or

local government officials to prevent any harm to public health or the environment. 42 U.S.C. §9613(f)(1).

12. Other factors found relevant by courts are: (1) the financial resources of the parties; (2) the knowledge possessed by the parties of the environmental problem at the facility; (3) awareness of environmental risk; (4) profitability of the selected disposal method and other financial interests that a party had or has in the site; (5) efforts by the parties to prevent harm to the public; and (6) the parties' good faith attempts to reach a settlement. *American Cyanimid Corp. v. Nascolite Corp.*, 1995 WL 934871 (D.N.J., March 31, 1995); *Southland Corp. v. Ashland Oil. Inc.*, 696 F.Supp. 994, 1003 (D.N.J. 1988).

13. CERCLA is premised upon the policy that the "polluter pays."

14. Any allocation in this case must encompass the entire site, and must include investigation expenses which have resulted in certain areas of the site being found not to need remediation.

15. Recovery of costs pursuant to CERCLA requires that actions taken be "consistent with" the NCP. There is no requirement that the actions be no more than are necessary. There is no authority for viewing the consistency of actions taken in hindsight, i.e., by arguing that certain actions may not have been necessary. In short, there is no requirement that the a remedial investigation "perfect" before costs expended will be found to be consistent with the "NCP" and, therefore, recoverable in a CERCLA action.

16. Mead, through the testimony of Dr. Ball, seems to assert that any action which would not be forced upon a PRP

under CERCLA would not be "consistent" with the NCP. The court disagrees. Again, the NCP vests discretion in individual professionals involved in the investigation and remediation of a particular site to select from a range of options. There is no support in the law for Dr. Ball's hypothesis, and the expert testimony offered by Beazer concerning the practice in the field is entirely to the contrary.

17. The NCP repeatedly refers to investigation and remediation of an entire "site." This clearly must refer to all areas of the site, at least in the sense of conducting an investigation sufficient to determine which areas need remediation.

18. Investigative costs associated with the RCRA investigation of the site are consistent with the NCP and are recoverable costs.

19. Mead is, in fact, responsible for placing most of the contamination at the Woodward Coke Plant.

20. Volumetric calculations are the best and most accurate indicator of the percentage of wastes placed by each party on the site, although precise percentages of contribution are not available in this case.

21. Mead placed approximately 90% of the waste on site.

22. Beazer and KII combined placed approximately 10% of the waste on site.

23. KII will, after remediation, own property which is more valuable than it was pre-remediation. KII will also have the opportunity to recoup its costs through further sales of coke. KII will not, however, reap any unanticipated profits

due to the effects of environmental regulations on the domestic coke market. Thus, it is equitable to assign KII a share of the response costs in this case, although that share should be minor in light of the overarching policy of "polluter pays."

24. The share assigned to KII should be 2.5% of the total site inspection and remediation costs.

25. The doctrine of *caveat emptor*, although not a defense to CERCLA liability, may "be considered in mitigation of amount due." *Smith Land*, 851 F.2d at 90.

26. Also, "[a] reduction in the purchase price of a facility is certainly a valid factor to be considered in allocating CERCLA response costs among responsible parties." *A1 Tech Specialty Steel v. Allegheny International Credit*, 104 F.3d 601, 607 (3d Cir. 1997). Likewise, purchasing property with knowledge of the environmental condition thereof, knowledge Beazer clearly had, is an appropriate factor to consider.

27. Beazer purchased the property from Mead pursuant to the doctrine of *caveat emptor* and with full knowledge of the contamination, or potential contamination, on site.

28. Beazer purchased the property "as is" and with knowledge that the property had been contaminated by its decades of use as a coking facility. Beazer also had intimate knowledge of the site in terms of the manner and extent of the contamination on site.

29. Mead is entitled to a reduction in its "polluter pays" allocation due to its reasonable expectation, and Beazer's intent, to accept responsibility for all environmental regulation at the site post-sale.

30. Mead's assertion that all or even most of the liability should be shifted pursuant to the faulty indemnification agreement must fail. Such a result would give the agreement, found legally insufficient under Alabama law, the force of law, and would place this court's decision at odds with the ruling made by the Court of Appeals.

31. There is, also, a danger of "double counting" some of the equitable factors. For example, the court's decision that the parties intended an indemnity agreement would be a finding that the parties intended that all environmental liability shift from Mead to Beazer. A finding that the sale took place under the principle of *caveat emptor*, on the other hand, would establish that Beazer assumed the risk of any future environmental costs arising from then-existing land conditions. These considerations seem to the court to be, if not coterminous, at least overlapping. One or the other will constitute a larger assessment of essentially the same consideration, i.e., whether the nature of the sale should impose upon Beazer liability for hazardous substances placed on site by Mead. Thus, they will not be considered separately, but will be considered as a single, overlapping factor, including all circumstances surrounding the 1974 sale of the Plant to Beazer.

32. In addressing the effect, if any, that the factors of idemnity, *caveat emptor* and a purchase "as is" may have, the court's analysis in *Alcan-Toyo America v. Northern Illinois Gas*, 881 F.Supp. 342 (N.D.Ill. 1995) is instructive. In that case, Alcan-Toyo's predecessor purchased the property in question prior to the enactment of CERCLA, and after the site had become contaminated with coal tar. Although all of the coal tar was placed on site by the prior owner, future clean-up costs were assessed 90% to the prior owner and 10% to the present owner. The court found that Alcan-Toyo should bear

some of the costs of clean-up, even though it was not at fault in placing any hazardous substances on site, due to the doctrine of *caveat emptor*, and the fact that Alcan-Toyo would benefit generally from an environmentally clean site. In this case, unlike *Alcan-Toyo*, each of the three responsible parties has contributed to the presence of hazardous substances on site. Beazer and KII, which have not taken into account any additions to their respective shares of the clean-up costs, ask that Mead be assessed 90% of the clean-up costs. In this case, a fair and equitable consideration of the issue *caveat emptor* and the sale of the site "as is," results in the shifting of liability from Mead to Beazer in the amount of 15 percent of the total cost of site inspection and remediation.

33. The undersigned's recommendations for the final equitable allocation amounts in this case are, therefore: KII - 2.5%; Mead 73.75% (90% of the waste, minus 1.25% for KII's share, minus 15% shifted to Beazer due to contractual indemnity, *caveat emptor*, and "as is" language in contract); and Beazer 23.75% (10% of the waste, minus 1.25% for KII's share, plus 15% shifted from Mead).

Date: November 24, 1999

cc: Robert A. King, Esquire
Kenneth R. Bruce, Esquire
Albert Bates, Jr. IV, Esquire
Timothy C. Wolfson, Esquire
Babst, Calland, Clements
& Zomnir, P.C.
Two Gateway Center, Eighth Floor
Pittsburgh, PA 15222

John H. Bingler, Jr., Esquire
George P. Faines, Esquire
Thorp, Reed &Armstrong
One Riverfront Center
Pittsburgh, PA 15222

Alan M. Wiseman, Esquire
Thomas A. Isaacson, Esquire
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Van Carson, Esquire
Charles R. McElwee, II, Esquire
Squire, Sanders & Dempsey
127 Public Square
4900 Society Center
Cleveland, OH 44114-1304

John E. Frey, Esquire
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive, 30th Floor
Chicago, IL 60606-1225

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed April 30, 1997]

Civil Action No. 91-408

BEAZER EAST, INC.,

Plaintiff,
Counterdefendant,

v.

THE MEAD CORPORATION,

Defendant,
Counterclaimant,
Third-Party Plaintiff,
Third-Party Counterdefendant,

v.

KOPPERS INDUSTRIES, INC.,

Third-Party Defendant,
Third-Party Counterclaimant.

MEMORANDUM AND ORDER OF COURT

DIAMOND, D.J.

Presently before the court are defendant Mead Corporation's ("Mead") "objections" to paragraphs 12 and 13 of Magistrate Judge Benson's order of August 29, 1996, setting forth a schedule for the filing of various pretrial materials in order to implement this court's order of July 8, 1996, and a motion to stay a hearing scheduled for May 6, 1997, in conjunction therewith. For the reasons set forth below, Mead's objections will be overruled and its motion for stay will be denied.

On July 8, 1996, this court issued a memorandum order granting in part and denying in part Mead's motion for partial summary judgment. The pertinent part of the July 8, 1996, order is as follows:

> It further appearing that a determination of the equitable factors to be considered in the parties' claims for contribution have not yet been determined and that a report and recommendation identifying such appropriate factors as well as setting forth a comprehensive allocation of Beazer's clean-up costs among the parties is appropriate at this juncture, IT IS ORDERED that a scheduling conference shall be held before the magistrate judge wherein time frames shall be established for (1) proposing the equitable factors to be considered under §9613(f), (2) submitting briefs in support of an allocation of Beazer's clean-up costs among the parties and, after a hearing, if necessary, (3) the submission of a report addressing the same. A copy of this court's case management order for non-

> jury trials is attached for the magistrate judge's consideration in connection herewith.

Defendant Mead did not object to the July 8, 1996, order entered by this court nor file a motion requesting reconsideration of the same.

On August 29, 1996, after a conference with counsel, the magistrate judge entered a scheduling order which set forth thirteen separate dates by which the parties were to file appropriate materials addressing the matters necessary for issuing a report and recommendation as to the equitable factors which should be taken into account under 42 U.S.C. §9316(f) in allocating the parties respective liability for the clean-up costs an the Woodward, Alabama Coke Plant. On September 16, 1996, Mead filed an objection to the magistrate judge's order of August 29, 1996, contending that the scheduled hearing is inconsistent with the grant of authority set forth in the Magistrates Act, 28 U.S.C. §636, because the identification of the equitable factors may require the magistrate judge to make credibility assessments with regard to fact and expert witness testimony and that the hearing essentially constitutes a trial of the parties' dispute. Plaintiff and third-party defendant contend that the July 8, 1996, order was a proper reference to the magistrate judge because the proceedings are necessary to identify the predicates which subsequently will govern a difficult computation of damages and that defendant has failed to identify any concrete basis which would support its contention that the scheduled hearing will result in a waste of judicial resources.

The magistrate judge's scheduling order of August 29, 1996, to which defendants filed objections merely implemented this court's July 8, 1996, order, and therefore

the defendant's objections are in effect untimely objections to that order.

Even assuming arguendo that defendant's objections to the magistrate judge's scheduling order of August 29, 1996, are sufficient to preserve Mead's contention that the ultimate report and recommendation to be issued by the magistrate judge will violate the Magistrates Act, the contention is without merit. First, the identification of the equitable factors that will be relevant in an ultimate disposition of this case essentially is a pretrial matter and constitutes a significant step in resolving the parties' current dispute. In addition, "submitting briefs in support of an allocation of Beazer's clean-up costs among the parties" likewise is a pretrial undertaking which is necessary to narrow the issues for trial. Thus, the inquiry at this juncture is not a dispositive one.

Moreover, even assuming that assessments regarding the persuasive aspects of the testimony and evidence proffered by the parties will be taken into account in identifying the various equitable factors to be considered by the court under the circumstances, the order of reference clearly indicated that the magistrate judge was to issue a report and recommendation to this court, to which Mead will be able to file timely objections. Thus, any contention that this court does not retain de novo review over the matters referred to the magistrate judge is misplaced. See Perentz v. United States, 501 U.S. 923, 924 (1991) (the category of additional duties under §636(b)(3) is expansive rather than restrictive); Geras v. LaFayette Display Fixtures, Inc., 742 F.2d 1037, 1042 (7th Cir. 1984) ("as long, however, as an appropriate balance is maintained between magistrates and Article III judges so that a real option of trial by an Article III judge is preserved, we cannot say that the Constitution has been violated.").

Finally, the possibility that this court may have to rehear certain portions of the evidence and/or hold additional hearings on the same subject matter is more than offset by the benefits to be derived from the procedure ordered by the court. Mead's contention that the matters underlying the parties' dispute are complex certainly is well-taken and is one of the reasons the order of reference directed the magistrate judge to perform those tasks which are necessary to (1) narrow the issues for trial, (2) provide this court with a sufficient understanding of the background of the case and the pertinent factors which govern the ultimate resolution of the parties' cross-claims and (3) identify those factual areas which are or are not materially disputed. This will enable the court to evaluate any contentions raised in opposition to the report and/or at the time of trial in a concrete context. Thus, the undertaking will conserve judicial resources. Accordingly, defendant's objections will be overruled and its motion for a stay of further proceedings will be denied.

An appropriate order will follow.

ORDER

AND NOW, this 30th day of April, 1997, for the reasons set forth in the memorandum filed this day, IT IS ORDERED that the objections to the magistrate judge's order (Document No.205) be, and the same hereby is, overruled; and,

IT IS FURTHER ORDERED that defendant's motion to stay (Document No. 242) be, and the same hereby is, denied.

/s/_____
Gustave Diamond
United States District Judge

cc: Honorable Kenneth J. Benson
United States Magistrate Judge

Kenneth E. Bruce, Esq.
Albert V. Bates, Jr., IV, Esq.
Babst, Callaland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, PA 15222

Billie S. Flaherty
Beazer East, Inc.
436 Seventh Avenue
Pittsburgh, PA 15219

John E. Frey, Esq.
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive
30th Floor
Chicago, IL 60606-1225

George P. Faines, Esq.
Thorp, Reed & Armstrong
One Riverfront Center
Pittsburgh, PA 15222

Van Carson, Esq.
Charles R. McElwee, II, Esq.
Wendelene M. Lavey, Esq.
Squire, Sanders & Dempsey
4900 society Center
127 Public Square
Cleveland, OH 44114-1304

Alan M. Wiseman, Esq.
Thomas A. Isaacson, Esq.
Gilbert S. Keteltas, Esq.
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Alan M. Wiseman, Esq.
Thomas A. Isaacson, Esq.
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

[Filed August 29, 1996]

Civil Action No. 91-408

BEAZER EAST, INC.,

Plaintiff,
Counterdefendant,

v.

THE MEAD CORPORATION,

Defendant,
Counterclaimant,
Third-Party Plaintiff,

v.

KOPPERS INDUSTRIES, INC.,

Third-Party Defendant.

ORDER

AND NOW, this 29th day of August, 1996, after conference with counsel, IT IS ORDERED that:

1. by August 30, 1996, both parties shall file their lists of suggested appropriate equitable factors;

2. by September 13, 1996, both parties may respond to the list of suggested appropriate equitable factors submitted by the other;

3. by September 16, 1996, plaintiff Beazer East, Inc. shall file its expert reports;

4. by October 31, 1996, defendants shall file their rebuttal expert reports;

5. on January 15, 1997, expert discovery shall be completed;

6. by February 17, 1997, plaintiff shall file its brief on comprehensive allocation issues;

7. by March 10, 1997, defendants shall file their responsive brief on comprehensive allocation issues;

8. by March 20, 1997, plaintiff may file a reply brief on comprehensive allocation issues;

9. by April 3, 1997, the parties shall file a pretrial stipulation and exhibit list directed to, and in anticipation of, a hearing to be held before the undersigned for the purpose of recommending appropriate equitable factors and setting out a recommended cost allocation;

10. by April 14, 1997, plaintiff shall file its proposed findings of fact and conclusions of law;

11. by April 24, 1997, defendants shall file their proposed findings of fact and conclusions of law;

12. a hearing, if necessary, will be held on Tuesday, May 6, 1997, at 9:30 a.m.

13. by June 16, 1997, the Report, containing recommended findings of fact, conclusions of law and recommended disposition as to allocation to be filed.

/s/_____
Kenneth J. Benson
United States Magistrate Judge

cc: Robert A. King, Esquire
Kenneth R. Bruce, Esquire
Albert Bates, Jr. IV, Esquire
Timothy C. Wolfson, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center, Eighth Floor
Pittsburgh, PA 15222

Billie S. Flaherty, Esquire
Beazer East, Inc.
436 Seventh Avenue
Pittsburgh, PA 15219

John H. Bingler, Jr., Esquire
George P. [illegible]es, Esquire
Thorp, Ree[illegible] Armstrong
One Riverfront Center
Pittsburgh, PA 15222

Alan M. Wiseman, Esquire
Thomas A. Isaacson, Esquire
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Van Carson, Esquire
Charles R. McElwee, II, Esquire
Squire, Sanders & Dempsey
127 Public Square
4900 Society Center
Cleveland, OH 44114-1304

Stephen V. Moser, Esquire
Associate General Counsel
The Mead Corporation
World Headquarters
Courthouse Plaza Northeast
Dayton, OH 45463

John E. Frey, Esquire
Wildman, Harrold, Allen & Dixon
225 West Wacker Drive
30th Floor
Chicago, IL 60606-1225

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-408

[Filed August 12, 1996]

BEAZER EAST, INC.,	)
Plaintiff,	)
	)
v.	)
	)
THE MEAD CORPORATION,	)
Defendant.	)
	)

MEMORANDUM ORDER

AND NOW, this 8th day of July, 1996, upon due consideration of Magistrate Judge Kenneth J. Benson's report and recommendation of April 16, 1996, recommending that defendant Mead's motion for partial summary judgment be denied and a *de novo* review of the record in conjunction therewith, IT IS ORDERED that defendant Mead's motion (Document No. 155) be, and the same hereby is, granted in part and denied in part. The 42 U.S.C. §9607 prerequisites which are necessary for Beazer to maintain its instant claim of contribution against Mead under 42 U.S.C. §9613(f) properly have been established pursuant to the proceedings resulting in the affirmance of the magistrate judge's report and recommendation of May 12, 1993, wherein Mead was determined to be a responsible party under 42 U.S.C. §9607. Accordingly, to the extent that the motion attempts to preclude

Beazer from establishing the §9706 prerequisites for a contribution claim pursuant to 42 U.S.C.§9316(f) it is denied as moot. To the extent that the motion seeks to preclude Beazer from further maintaining an ongoing §9706 theory of recovery against Mead in the instant context, the motion is granted. Even assuming that there are contexts in which a private party who has shouldered the responsibility of complying with governmentally sanctioned site clean-up can pursue a dual recovery under §9706 and §9613(f), *see Gould, Inc. v. A&M Battery and Tire Service*, 901 F.Supp. 906, 913 (M.D.Pa. 1995)(acknowledging that a cost recovery action may exist under §9706 as implied in *Key Tronic Corp. v. United States*,___ U.S. ___, 114 S.Ct. 1960 (1994), but noting that whether the action is available to "a non-innocent party" has not yet been addressed by the Supreme Court or the Third Circuit and concluding that "based on the numerous circuit holdings as well as the implicit findings in the Third Circuit, when a private responsible party sues another responsible party to reapportion costs, that action will be a "contribution" action pursuant to §113"), Beazer has failed to identify an additional bases for recovery or damages under a §9706 claim which would not be included in a final allocation of the parties' contribution claims under §9613(f) in the instant proceeding. To the extent that the motion seeks to preclude Beazer from advancing its §9613(f) action on the bases that Beazer's response costs were incurred on a voluntary nature or were incurred under the Resource Conservation Recovery Act, 42 U.S.C. §6901 *et seq.*, the motion likewise is denied. To the extent it is consistent herewith, the magistrate judge's report and recommendation of April 16, 1996, is adopted in support of this order; and,

It further appearing that a determination of the equitable factors to be considered in the parties' claims for contribution have not yet been determined and that a report and

recommendation identifying such appropriate factors as well as setting forth a comprehensive allocation of Beazer's clean-up costs among the parties is appropriate at this juncture, IT IS ORDERED that a scheduling conference shall be held before the magistrate judge wherein time frames shall be established for (1) proposing the equitable factors to be considered under §9613(f), (2) submitting briefs in support of an allocation of Beazer's clean-up costs among the parties and, after a hearing if necessary, (3) the submission of a report addressing the same. A copy of this court's case management order for non-jury trials is attached for the magistrate judge's consideration in connection herewith.

/s/_____
Gustave Diamond
United States District Judge

cc: Robert A. King, Esq.
Kenneth R. Bruce, Esq.
Babst, Callaland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, PA 15222

George P. Faines, Esq.
Thorp, Reed & Armstrong
One Riverfront Center
Pittsburgh, PA 15222

Alan M. Wiseman, Esq.
Thomas A. Isaacson, Esq.
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

cc: Honorable Kenneth J. Benson
United States Magistrate Judge

George E. Yokitis, Esquire
Kenneth R. Bruce, Esquire
Albert Bates, Jr., IV, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center, Eighth Floor
Pittsburgh, PA 15222

Billie S. Flaherty, Esquire
Beazer East, Inc.
436 Seventh Avenue
Pittsburgh, PA 15219

John H. Bingler, Jr., Esquire
George P. Faines, Esquire
Thorp, Reed & Armstrong
One Riverfront Center
Pittsburgh, PA 15222

Alan M. Wiseman, Esquire
Richard W. Fields, Esquire
Steven L. Leifer, Esquire
Thomas A. Isaacson, Esquire
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

STATUTORY PROVISIONS INVOLVED

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART III. COURT OFFICERS AND EMPLOYEES
CHAPTER 43. UNITED STATES MAGISTRATES

28 USC § 636

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate [magistrate judge] serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law--

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)(1) Notwithstanding any provision of law to the contrary--

(A) a judge may designate a magistrate [magistrate judge] to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's [magistrate judge's] order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate [magistrate judge] to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate [magistrate judge] shall file his proposed findings and recommendations under subparagrpah (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or

recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [magistrate judge]. The judge may also receive further evidence or recommit the matter to the magistrate [magistrate judge] with instructions.

(2) A judge may designate a magistrate [magistrate judge] to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate [magistrate judge] to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate [magistrate judge] may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates [magistrate judge's] shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary--

(1) Upon the consent of the parties, a full-time United States magistrate [magistrate judge] or a part-time United States magistrate [magistrate judge] who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to

exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate [magistrate judge] may exercise such jurisdiction, if such magistrate [magistrate judge] meets the bar membership requirements set forth in section 631(b)(1) [28 USC § 631(b)(1)] and the chief judge of the district court certifies that a full-time magistrate [magistrate judge] is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate [magistrate judge] is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate [magistrate judge] to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate [magistrate judge] may again advise the parties of the availability of the magistrate [magistrate judge], but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates [magistrate judges] shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate [magistrate judge] in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate [magistrate judge] designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate [magistrate judge] under this subsection.

(5) The magistrate [magistrate judge] shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter [28 USC §§ 631 et seq.] shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title [28 USC § 2072].

(e) Contempt authority.

(1) In general. United States magistrate judge serving under this chapter [28 USC §§ 631 et seq.] shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority. A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases. In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, or both, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases. In any case in which a United

States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties. The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court. Upon the commission of any such act--

(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where--

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders. The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate

[magistrate judge] may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate [magistrate judge] shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate [magistrate judge] so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635 [28 USC § 635].

(g) A United States magistrate [magistrate judge] may perform the verification function required by section 4107 of title 18, United States Code. A magistrate [magistrate judge] may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate [magistrate judge] assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate [magistrate judge] who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate [magistrate judge] in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate [magistrate judge] may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment

of an annuity set forth in section 377 of this title [28 USC § 377] or in subchapter III of chapter 83, and chapter 84, of title 5 [5 USC §§ 8331 et seq., 8401 et seq.] which are applicable to such magistrate [magistrate judge]. The requirements set forth in subsections (a), (b)(3), and (d) of section 631 [28 USC § 631], and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate [magistrate judge], shall not apply to the recall of a retired magistrate [magistrate judge] under this subsection or section 375 of this title [28 USC § 375]. Any other requirement set forth in section 631(b) [28 USC § 631(b)] shall apply to the recall of a retired magistrate [magistrate judge] under this subsection or section 375 of this title [28 USC § 375] unless such retired magistrate [magistrate judge] met such requirement upon appointment or reappointment as a magistrate under section 631 [28 USC § 631].

TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 103. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

42 USC § 9613

§ 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia.

Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue.

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review.

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by title II of this Act, or to the review of any regulation promulgated under the Internal Revenue Code of 1954 [26 USC §§ 1 et seq.].

(d) Litigation commenced prior to December 11, 1980.

No provision of this Act shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to enactment of this Act [enacted Dec. 11, 1960].

(e) Nationwide service of process.

In any action by the United States under this Act, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution.

(1) Contribution.

Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [42 USC § 9607(a)], during or following any civil action under section 106 [42 USC § 9606] or under section 107(a) [42 USC § 9607(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In

resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107 [42 USC § 9606 or 9607].

(2) Settlement.

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement.

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought.

(1) Actions for natural resource damages.

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 101(6) [42 USC § 9601(6)]) under this Act, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 301(c) [42 USC § 9651(c)].

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 120 [42 USC § 9620] (relating to Federal facilities), or any vessel or facility at which a remedial action under this Act is otherwise scheduled, an action for damages under this Act must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this Act with respect to such a vessel or facility be

commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 104(b) or section 120 [42 USC § 9604(b) or § 9620] (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before the enactment of the Superfund Amendments and Reauthorization Act of 1986 [enacted Oct. 17, 1986].

(2) Actions for recovery of costs. An initial action for recovery of the costs referred to in section 107 [42 USC § 9607] must be commenced--

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 104(c)(1)(C) [42 USC § 9604(c)(1)(C)] for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 107 [42 USC § 9607] for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 107 [42 USC § 9607] for recovery of costs at any time after such costs have been incurred.

(3) Contribution.

No action for contribution for any response costs or damages may be commenced more than 3 years after--

(A) the date of judgment in any action under this Act for recovery of such costs or damages, or

(B) the date of an administrative order under section 122(g) [42 USC § 9622(g)] (relating to de minimis settlements) or 122(h) [42 USC § 9622(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation.

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be

commenced under this title [42 USC §§ 9601 et seq.] more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments.

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 119 [42 USC § 9619], an action under section 107 [42 USC § 9607] for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents.

The time limitations contained herein shall not begin to run--

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review.

No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate

under section 121 [42 USC § 9621] (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 104 [42 USC § 9604], or to review any order issued under section 106(a) [42 USC § 9606(a)], in any action except one of the following:

(1) An action under section 107 [42 USC § 9607] to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 106(a) [42 USC § 9606(a)] or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 106(b)(2) [42 USC § 9606(b)(2)].

(4) An action under section 310 [42 USC § 9659] (relating to citizens suits) alleging that the removal or remedial action taken under section 104 [42 USC § 9604] or secured under section 106 [42 USC § 9606] was in violation of any requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 106 [42 USC § 9606] in which the United States has moved to compel a remedial action.

(i) Intervention.

In any action commenced under this Act or under the Solid Waste Disposal Act in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter,

impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by existing parties.

(j) Judicial review.

(1) Limitation.

In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard.

In considering objections raised in any judicial action under this Act, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy.

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural errors.

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) Administrative record and participation procedures.

(1) Administrative record.

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures.

(A) Removal action.

The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code [5 USC §§ 501 et seq.] establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial action.

The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 117(a)(2) [42 USC § 9617(a)(2)] (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of

section 117(d) [42 USC § 9617(d)], The President shall promulgate regulations in accordance with chapter 5 of title 5 of the United States Code [5 USC §§ 501 et seq.] to carry out the requirements of this subparagraph.

(C) Interim record. Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this Act shall not include an adjudicatory hearing.

(D) Potentially responsible parties. The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(l) Notice of actions. Whenever any action is brought under this Act in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

(4)

No. 05-524

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BEAZER EAST, INC.,
Petitioner,

v.

THE MEAD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT THE MEAD CORPORATION'S BRIEF IN OPPOSITION

PIERRE H. BERGERON
SQUIRE, SANDERS & DEMPSEY LLP
312 Walnut Street
Suite 3500
Cincinnati, Ohio 45202
(513) 361-1200

VAN CARSON
Counsel of Record
WILLIAM V. SHAKLEE
SQUIRE, SANDERS & DEMPSEY LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8500

WILSON-EPES PRINTING CO., INC. – (202) 789-0093 – WASHINGTON, D. C. 20001

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent The Mead Corporation, n/k/a MW Custom Papers, LLC, states that it is wholly owned by MeadWestvaco Corporation, which has no parent corporation.

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RESPONDENT THE MEAD CORPORATION'S BRIEF IN OPPOSITION

Nothing in this case warrants this Court's intervention. The Third Circuit unanimously held that the delegation of a key component of a CERCLA contribution trial by the district court to a magistrate judge could not stand in the absence of consent. In ruling that the equitable allocation phase of a CERCLA trial that takes place after establishment of liability falls within the district court's province, the Third Circuit remained faithful to the plain language of the Federal Magistrates Act, as amplified by this Court's precedent.

Although the district court decided to send what turned out to be a 12 day evidentiary hearing in which 14 witnesses testified and approximately 1300 exhibits were introduced to the magistrate by calling it a "pretrial" matter, the Third Circuit disagreed with this characterization. The equitable allocation phase involves "one of the ultimate issues to be tried" in a CERCLA action and thus could hardly be described as "pretrial." (Pet. App. 20a). Perhaps recognizing the weakness of the district court's position, in its Third Circuit brief, Petitioner made a passing reference to the "additional duties" clause as a possible grounds for resurrecting the flawed reference. The Third Circuit paid little heed to this argument, appreciating that it contravened both the language of the statute and the guidance set forth by this Court. Yet the "additional duties" argument is the sole grounds now featured as a basis for certiorari in the Petition.

Petitioner first insists that the Third Circuit created a direct conflict with the Tenth Circuit. During the proceedings below, Petitioner never mentioned the Tenth Circuit's decision at all. Nor was this case referenced by the Third Circuit, and for good reason. Like the other authority relied upon by Petitioner, this case simply does not pose a conflict.

Petitioner's next claim, that the Third Circuit decision conflicts with this Court's precedent, also falls flat in the face of its admission that the Court "has not ruled" on the question presented. Finally, this case does not present an appropriate vehicle for certiorari. Seeking to imbue this case with greater importance, Petitioner devotes much of its argument to constitutional issues that could theoretically be implicated by the Federal Magistrates Act. Its problem, however, is that the Third Circuit resolved the matter on purely statutory grounds without delving into the constitutional thicket. Petitioner also conveniently omits the fact that the Third Circuit held that even if the reference to the magistrate had been proper, the district court erred in its analytical approach, meaning that the case has to be remanded regardless of the certiorari disposition. For myriad reasons, therefore, the Petition should not be granted.

STATEMENT OF THE CASE

Petitioner omits several key details about this case, leaving the portrait incomplete. This litigation arises from the sale by The Mead Corporation ("Mead" or "Respondent") of a coke manufacturing plant to the predecessor of Beazer East, Inc. ("Beazer" or "Petitioner") in 1973. Some 15 years later, Beazer entered into an order with the U.S. EPA to clean up the facility under the Resource Conservation and Recovery Act. This long-running CERCLA litigation ensued, as an effort by Beazer to recover contribution from Mead despite the fact that Mead's contract selling the site at issue made clear that the parties understood that it would not bear any environmental liability. (Pet. App. 34a).

In this case's debut before the Third Circuit a decade ago, the court remanded essentially to accomplish two tasks. With liability for the environmental harm beyond dispute, the district court was instructed to "determine which of Beazer's response costs were necessary and consistent with the National Contingency Plan (NCP), 42 U.S.C. § 9607(a)(4)(B), and what percentage of those costs should be

born by each of the responsible parties . . ." (Pet. App. 7a). In other words, the district court had to proceed to trial to determine how much each of the responsible parties owed.

Rather than resolve the second question, the district court delegated that task to a federal magistrate judge over Mead's objections. The Third Circuit deemed it "clear from the context that the court considered the equitable allocation issue a 'pretrial matter,'" which could be referred to a magistrate under 28 U.S.C. § 636(b)(1). (Pet. App. 17a).

The Third Circuit wasted little time in concluding that the matter referred to the magistrate did not constitute a "pretrial matter." The Petition perpetuates a problem from the briefing below – it proves unable to accurately describe what proceeding the magistrate oversaw. Before the Third Circuit, Petitioner equated the magistrate's task to a hearing on injunctive relief; now, the analogy of choice is that the magistrate just conducted proceedings akin to a *Daubert* hearing. (Pet. at 17).

Yet the Third Circuit saw through these labels and found that the magistrate had conducted a trial. Like Petitioner, the "District Court significantly understates the significance and scope of the referral." (Pet. App. 19a). The parties did not just submit pleadings for the magistrate's perusal; rather, "they presented extensive testimonial and documentary evidence over the course of a 12-day hearing." (*Id.*). Roughly 1300 exhibits were introduced and 14 witnesses examined in this proceeding. At the conclusion of the hearing, the magistrate produced a 100 page decision (Pet. App. 131a-232a) containing proposed findings of fact and conclusions of law that "not only identified equitable factors but also applied those factors to make a recommendation as to the allocation of liability among the parties." (Pet. App. 19a). This is the essence of a CERCLA contribution action: "Contrary to the District Court's assertions, then, the issue referred to the Magistrate Judge was not a precursor to resolution of the ultimate issue – *it was one of the ultimate*

issues to be tried. In fact, it was the only issue in the case unique to contribution claims." (Pet. App. 20a; emphasis added).

As a result, magistrate "did not facilitate the District Court's ultimate adjudicatory function – he assumed that function." (Pet. App. 22a). The magistrate "tried part of the case and usurped the role of the District Judge." (*Id.*). When the district court reviewed the magistrate's findings, it adopted all of the factual findings and legal conclusions save one – it trimmed Mead's percentage of responsibility from 73.75% to 67.5%.

The Third Circuit accordingly held the reference improper under § 636(b)(1). Cognizant of its problems on the pretrial argument, Petitioner sought to salvage the referral under two additional grounds on appeal. First, it invited the Third Circuit to "recharacterize" the reference as the designation of the magistrate as a special master under § 636(b)(2). The Third Circuit rejected that argument.

The court recognized that a reference to a magistrate as a special master would only be proper if the matter involved a "difficult computation of damages" that could be justified upon the showing of some "exceptional condition." (Pet. App. 24a). Because both requirements were wanting, the Third Circuit held that any reference to the magistrate as a special master would have been an abuse of discretion. Special masters can be tapped for proceedings that "generally do not call for any peculiar judicial talent or insight," whereas equitable apportionment "is a quintessentially judicial endeavor." (Pet. App. 26a). Reiterating its earlier conclusions, the Third Circuit explained that the issue referred to the magistrate "were foremost among the 'basic issues' to be tried, and the District Court's referral of those issues without the parties consent was 'an abdication of the judicial function.'" (Pet. App. 27a).

Second, Petitioner pointed to another statutory section not referenced by the district court – the "additional duties"

clause contained in § 636(b)(3). Although this issue received comparatively little attention in both the briefing on appeal (consuming less than four pages of Beazer's 50-page brief) and in the Third Circuit decision, it has emerged as the only ground advanced by Petitioner as a basis for certiorari.

The Third Circuit rejected Petitioner's "additional duties" argument because that clause "covers only subsidiary matters in the absence of the parties' consent, and equitable allocation is central, rather than subsidiary, to a CERCLA contribution action." (Pet. App. 29-30a). Citing this Court's precedent, the Third Circuit recognized that consent is the pivotal factor in determining whether referrals are authorized under the additional duties clause. While district courts enjoy wider latitude to refer matters under § 636(b)(3) when the parties concur, the absence of consent permits a narrower range of duties, as this Court has explained. Because Mead had not consented, the referral could only be authorized under § 636(b)(3) if the equitable allocation proceeding was a subsidiary matter. However, as the court had already discussed in detail that "equitable allocation is central to Beazer's CERCLA action, not subsidiary thereto." (Pet. App. 31a). Next, the Circuit turned to Petitioner's argument that the purported *de novo* review could cure the improper reference. However, because a magistrate's authority is jurisdictional, *de novo* review does not grant the district court immunity to make such improper references. Otherwise, the statutory provisions about consent would be rendered "meaningless" if the district court could always cure the reference through *de novo* review. (Pet. App. 32a).

Conspicuously absent from the Petition is any reference to the balance of the Third Circuit's opinion. After rejecting each of Petitioner's points about the magistrate reference, it addressed two of Mead's arguments on the merits of the district court's decision. The Third Circuit found that "the District Court committed legal error, and therefore abused its discretion, in prioritizing the parties' respective contributions of waste at the Woodward Coke Plant [and] in determining

the appropriate allocation of Beazer's response costs." (Pet. App. 34a). As a result, even if the magistrate reference had been entirely proper, the district court's judgment cannot stand. The Third Circuit also explained that the declaratory relief ordered by the district court was erroneous. (Pet. App. 44-42a).

REASONS FOR DENYING THE PETITION

I. Petitioner's Circuit "Split" Is Manufactured

In an attempt to create a conflict, much of the authority Petitioner cites does not even involve the "additional duties" clause of § 636(b)(3). *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1131 (2d Cir. 1977), a case portrayed by Petitioner as endorsing an "expansive view" of magistrate referrals under § 636(b)(3), (Pet. at 9), actually involved a referral "to a magistrate as special master" under Fed. R. Civ. P. 53(b).[1] The case contains no analysis of the additional duties clause, and thus could hardly conflict with the Third Circuit decision.[2] *See also In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985) (evaluating reference to magistrate as special master under Fed. R. Civ. P. 53(b) and this Court's decision in *LaBuy v. Howes Leather*, 352 U.S. 249 (1957)); *Hill v. Duriron Co.*, 656 F.2d 1208, 1214 (6th Cir. 1981).

Another case that Petitioner describes as "out of step" with the Third Circuit's reasoning is *Feist v. Jefferson County Comm'rs Ct.*, 778 F.2d 250 (5th Cir. 1985). Yet in that case, the plaintiff *never challenged the propriety of the magistrate referral on appeal.* Nor is there any indication from the decision that the plaintiff ever objected below. Again, this

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[1] 28 U.S.C. § 636(b)(2) permits the district court to designate a magistrate as a special master under certain limited circumstances.

[2] The other case presented by Petitioner on this score is no more apposite. *In the Matter of Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335 (7th Cir. 1979) considered the issuance by a magistrate of an OSHA administrative inspection warrant, which is a far cry from conducting a trial.